FILED
DEC 7 1992
OFFICE OF THE CLERK

92-975

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THELMA L. GIBSON,
Petitioner,

v.

LOUIS W. SULLIVAN, M.D.,
Secretary, Department of Health and Human Services,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT M. ALEXANDER
2011 South Glebe Road
Arlington, VA 22204
(703) 920-7722
Counsel of Record and Counsel for Petitioner

Of Counsel:

GEORGE E. WALKER, PH.D., J.D.
2011 S. Glebe Road
Arlington, VA 22204
(703) 920-7722

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Did the District Court err in finding that the respondent met its burden in articulating a legitimate, non-discriminatory reason for not promoting petitioner to GS-13 for the reason that other candidates for promotion were more qualified?

2. Did the District Court fail to address procedural abuses used in the selection process?

3. Did the District Court err in accepting uncritically *inconsistent* subjective means for denying petitioner's promotion?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Thelma L. Gibson and the Respondents, Louis W. Sullivan, M.D., Secretary, Department of Health and Human Services.

The respondent before this Court is Louis W. Sullivan, M.D., Secretary, Department of Health and Human Services.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. The District Court erred in finding that it met its burden in articulating a legitimate, non-discriminatory reason for not promoting petitioner to GS-13	9
II. The District Court failed to address procedural abuses used in the selecting process.	13
III. The District Court erred in accepting uncritically *inconsistent* subjective means for denying petitioner's promotion.	19
CONCLUSION	21
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
Autry v. North Carolina Department of Human Resources, 820 F.2d 1384 (4th Cir. 1987)	10
Love v. Alamance Co. Board of Education, 757 F.2d 1504 (4th Cir. 1985)	14
Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982)	14
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	9
Moore v. City of Charlotte, 754 F.2d 1100 (4th Cir.), *cert denied*, 472 U.S. 1021 (1985)	10
Page v. Bolger, 645 F.2d 227, 230 (4th Cir.), *cert denied*, 454 U.S. 892, 102 S.Ct. 388 (1981)	20
Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert denied*, 471 U.S. 1115 (1985)	20
Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981)	10,14
United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, (1983)	9,10,14
Ward Cove Packing Co., Inc. v. Antonio, 109 S. Ct. 2115 (1989)	17
Warren v. Halstead Industries, Inc., 802 F.2d 746 (4th Cir. 1986), *rev'd in part aff'd in pertinent part*, 835 F.2d 535 (4th Cir.) *(en banc) (per curiam), cert denied*, 487 U.S. 1218 (1988)	10,14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-

THELMA L. GIBSON,

Petitioner,

v.

LOUIS W. SULLIVAN, M.D., SECRETARY, DEPARTMENT OF HEALTH and HUMAN SERVICES,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

The petitioner Thelma L. Gibson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States District Court, issued on February 20, 1991 and affirmed *per curiam* by the United States Court of Appeals for the Fourth Circuit on August 11, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Fourth Circuit, dated August 11, 1992 and mandated

September 15, 1992 was affirmed by unpublished per curiam opinion. See Appendix hereto.

The memorandum opinion and order of the United States District Court for the Eastern District of Virginia (Cacheris, J. C.) has not been reported. It is reported in the Appendix hereto.

JURISDICTION

Invoking federal jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000 e-16, the petitioner brought this suit *pro se* in the United States District Court for the District of Columbia on December 28, 1989. On July 3, 1990, the case was then transferred to the United States District Court for the District of Columbia on December 28, 1989. On July 3, 1990, the case was then transferred to the United States District Court for the Eastern District of Virginia.

On December 3, 1990, the District Court ruled that the Plaintiff/Petitioner had established a prima facie case of racial discrimination in denial of her promotion. On February 20, 1991, the District Court entered a judgment for the Defendant/Respondent. On July 23, 1991, the petitioner *pro se* filed an Informal Brief with the United States Court of Appeals for the Fourth Circuit. The judgment of the Appeals Court, *per curiam*, dated August 11, 1992, took effect on September 15, 1992, and affirmed the judgment of the District Court. Petitioner filed for a Re-Hearing *en banc* on August 21, 1992 which the court denied on September 8. 1992.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

(1) By writ of certiorari granted upon the petition of any civil or criminal case, before or after rendition of judgment or decree; . . .

STATEMENT OF THE CASE

The petitioner, Thelma L. Gibson, a Black female, was promoted to the GS-12 Hearings and Appeals Analyst position on September 11, 1977. Petitioner, a federal employee since 1963, worked under the Social Security Administration, an agency within the Department of Health and Human Services. Invoking Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e-16, petitioner brought suit *pro se* in the United States District Court for the District of Columbia on December 28, 1989, alleging racial discrimination in her employment. The case was subsequently transferred to the United States District Court for the Eastern District of Virginia on July 3, 1990.

At the time of Petitioner's 1977 promotion, attrition to the GS-13 Hearings and Appeals Analyst position was under the career ladder procedure, which changed shortly thereafter to a competitive procedure. Vacancies for GS-13 Hearings and Appeals Analyst positions were posted for the first time under the competitive procedure; in 1980. Petitioner competed and was on the best qualified list (BQL) for one of the 19 vacancies posted July 7-11, 1980, under announcement OHA-80-96. However, she was not selected for promotion. She was assigned to Branch 14

and her branch chief was Joseph Bernardi. Her Division III Director of the Office of Appeals Operations [later changed to the Office of Appellate Operations] and selecting official was Edwin W. Semans, Jr. No Blacks from Branch 14 were promoted to the GS-13 Hearings and Appeals Analyst position.

In 1982, 15 vacancies were posted August 25-31, 1982 for GS-13 Hearings and Appeals Analyst positions under announcement OHA 82-136. Petitioner competed, was on the BQL, and was again passed over for promotion. At that time, she had been transferred to Branch 17 under William Papovich, and Joseph Bernardi had been promoted by Edwin W. Semans, Jr., to the position of Director of Division III. A white male, Raymond Meisels was promoted to GS-13 from Branch 17. No Blacks were promoted to GS-13 from Branch 17 or from Division III (Plaintiff's Exhibit 11).

In 1983, 8 vacancies were posted July 13-19, 1983 for GS-13 Hearings and Appeals Analyst positions under announcement OHA 83-100. Petitioner competed, was on the BQL, and was passed over for promotion for the third time. A white male, Gerald Kelley, from Division 17 was promoted. No Blacks were promoted to GS-13 from Branch 17 or from Division III (Plaintiff's Exhibits 15 and 18).

In 1984, 19 vacancies were posted October 31, 1984 to November 6, 1984 for GS-13 Hearings and Appeals Analyst positions under announcement OHA 84-133. Petitioner competed, was on the BQL, and was passed over for the fourth time. A white male, Douglas Halleen, was promoted from Branch 17. No Blacks were

promoted from Branch 17 or from Division III. Petitioner filed a complaint on March 8, 1985 (Defendant's Exhibit 12-a, p. 000107) which lead to this action presently before the Court.

In 1985, 21 vacancies were posted December 2-6, 1985 for GS-13 Hearings and Appeals Analyst positions under announcement OHA 85-156. Petitioner competed, but was not on the BQL for the first time since 1980. Two white females, Mary Fischer and Marianne Julian, were promoted from Branch 17. Again, no Blacks were promoted from Branch 17 or from Division III. Petitioner later learned through filing the grievance that an error on her manpower sheet for December 1984 lowered her productivity rating, which eliminated her from this BQL (Plaintiff's Exhibit 21). She also learned that with the incorrect productivity scale of 137.56 percent, she was rated by "3" in GJT-105, productivity, by William Papovich, while two white males, Gary L. Gilliam and Walter A. Grissett, had lower productivity scales of 124.3 percent and 136.6 percent, respectively, and received a "4" in GJT-105 (Plaintiff's Exhibits 13-F and 13-I).

Finally, in 1986 two vacancies were posted November 18-24, 1986 for GS-13 Hearings and Appeals Analyst positions under announcement OHA 86-180. Petitioner competed, was again on the BQL for the fifth time, but was not selected for promotion. Two white females, Ruth Simmons and Linda Temple, were promoted. No Blacks from Branch 17 or Division III were promoted.

For the five-year period in question, 1982 through 1986, no Blacks were selected for the promotion to GS-13 Hearings and Appeals Analyst position by Ed-

win W. Semans, Jr. from Division III; no Blacks were recommended for promotion to the GS-13 Hearings and Appeals Analyst position by Joseph Bernardi; and no Blacks were recommended for promotion to the GS-13 Hearings and Appeals Analyst position by William Papovich. Neither Semans, Bernardi, nor Papovich have offered any concrete objective evidence in support of their obvious belief that white employees were more qualified for GS-13 positions than was Petitioner and other Blacks in the division. Because of this belief, Petitioner was rated/ranked lower than white employees although the objective evidence, the productivity scale percentage for example, clearly shows Petitioner's percentage was higher. Petitioner was the only analyst in her division to have the dubious distinction of being on five of six BQLs under the competitive procedure and had it not been for the Agency's error and treatment of Petitioner less favorably than white employees, she would have been on all six BQLs. More importantly, she would not have been stagnated in grade and prevented from advancing in her branch or division.

It should be noted for the record that of the 19 persons selected for promotion to GS-13 under VA OHA 84-133, 17 were white and two were black.

Thelma Gibson had more experience as a Hearings and Appeals Analyst than any of the selectees, she had a higher score on defendant's announced objective qualifications on which candidates were rated for promotion than seven of the 17 white selectees; she had a higher production rating than most of the selectees, and she had exactly the same performance ratings in writing and analytical skills as four of the white se-

lectees (Pl. Exhs., 13, 31, 36, 46 [Def. Adm. Nos. 47, 73 (4) in Response to Interr. No. 20]).

Ms. Gibson's immediate supervisor, William Papovich, who is white, rated her overall performance in 1982-83 and 1983-84 as excellent, with an outstanding rating in productivity, and in August 1984 she received an award for sustained superior performance based on his recommendation that described her as "the highest producer in the branch" (Pl. Exh. 1).

Thelma Gibson was recommended for promotion to GS-13 by Branch Chief Papovich, ranking her below two white women in her branch; however, she was not recommended for promotion by her second level supervisor, Division Director Joseph Bernardi, who is white (Def. Exh. 12(a) [Papovich Affidavit, Bernardi Affidavit which are exhs 8 and 9, respectively, to Admin. Record]).

Division Director Joseph Bernardi recommended to selecting official Edwin Semans, the Director of Appeals Operations, the names of 10 analysts for promotion to GS-13, all of whom were white [Def. Exh. 12(a) [Admin. Rec. Exh. 8, Bernardi Aff.]).

Division Director Bernardi's stated reasons for not recommending petitioner for promotion are that he eliminated her from consideration based on her Branch Chief's ranking of her behind two other analysts, Mr. Papovich's comments and, to some lesser degree, on the comments of Appeals Council member Joseph Doneghy (Def. Exh. 12(a) [Bernardi Aff.].

Selecting official Edwin Seman's stated reasons for not selecting Ms. Gibson were essentially that he concluded that there were other candidates who were superior in their capability of performing the duties

of a GS-13 hearings and appeals analyst (Def. Exh. 12(a) [Exh. 6 to Admin. Rec., Semans Aff.]).

Defendant's selection of candidates from the best qualified list was based on an informal, subjective ranking and elimination of candidates by division directors who had substantial discretion as to the methods and criteria they used to evaluate and eliminate candidates (Def. Exhs. 12 (a) [Affidavits of Semans, Bernardi and Papovich]; 12(b) [Testimony of Division Directors Joseph Bernardi, Bernard Dowgiello, Beatrice Squires]).

Defendant's selection process resulted in the elimination of petitioner from consideration based on a comparison with only one other actual candidate, Mary Fischer, and during the consideration of candidates petitioner's qualifications were never compared to those of any of the analysts who were promoted (Pl. Exh. 7; Def. Exh. 12(a) [Affidavits of Papovich, Bernardi, and Semans]).

No Black hearings and appeals analyst was promoted to GS-13 from Division III, Ms. Gibson's division headed by Division Director Joseph Bernardi, between 1982 and 1986 (Pl. Exh. 23).

Defendant's informal and subjective selection process resulted in a pattern of selections in the years 1982 through 1986 in which only 2 of the eight black analysts promoted to GS-13 were not from Division II, headed by Bernard Dowgiello, who was the only Division Director who sought written objective evaluations of candidates from his branch chiefs (Pl. Exh. 23; Def. Exh. 12 (b) [testimony of Bernard Dowgiello]).

Defendant's selection process resulted in an increasing disparity, between 1982 and 1986, in the propor-

tion of blacks who comprised the GS-12 analyst group from which GS-13 analysts were promoted as compared to the proportion of GS-13s who were black. In 1983 21.7% of GS-12 analysts were black, while 17.1% of GS-13 analysts were black, a difference of -4.6%. By 1986, 27.1% of GS-12s were black, while blacks comprised only 13.6% of the GS-13 analysts, a difference of -13.5% (Pl. Exh. 38).

REASONS FOR GRANTING THE WRIT

I. The District Court erred in finding that the Defendant met its burden in articulating a legitimate, non-discriminatory reason for not promoting petitioner to GS-13.

In his Order, dated December 3, 1990, Judge T. S. Ellis of the United States District Court for the Eastern District of Virginia (see Appendix) found that petitioner had established the first three elements of the prima facie case under Title VII—that she is black, that she applied for a job for which she was qualified, that she was rejected despite her qualifications—and that defendant's production of evidence of a non-discriminatory reason advances the appropriate analysis to the determination of whether defendant/respondent illegally discriminated against petitioner. *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); Order of December 3, 1990 at 7.

At trial on this matter, held on January 8, 1991, Plaintiff/Petitioner had the burden to show that the purportedly legitimate, non-discriminatory reasons articulated by defendant/respondent for its failure to select Petitioner for promotion to GS-13 were not its

true reasons and were but a pretext for intentional discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

Plaintiff/Petitioner then must show by a preponderance of the evidence that defendant's proferred explanation is unworthy of credence or that a discriminatory reason based on her race more likely motivated its decisions not to select her. *Burdine*, 450 U.S. at 253, 256; *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Moore v. City of Charlotte*, 754 F. 2d 1100, 1104-05 (4th Cir.), *cert denied*, 472 U.S. 1021 (1985).

Plaintiff may demonstrate through indirect, circumstantial evidence that defendant's action in denying her promotion was motivated by discriminatory intent in the absence of direct evidence of racial animus. *Warren v. Halstead Industries, Inc.*, 802 F.2d 746, 753 (4th Cir. 1986), *rev'd in part, aff'd in pertinent part*, 835 F.2d 535 (4th Cir.) *(en banc) (per curiam), cert. denied*, 487 U.S. 1218 (1988); *Autry v. North Carolina Department of Human Resources*, 820 F.2d 13284, 1385 (4th Cir. 1987).

The District Court found that the Plaintiff/Petitioner did not meet her burden. Petitioner disagrees. The record is replete with indirect and direct evidence of racial animus.

Respondent's contention that petitioner was not promoted because she had a "3" excellent rating for quality and not a "4" outstanding, is clearly discriminatory when white candidates with "3" excellent ratings were promoted. On the 10/01/82-09/30/83 appraisals used by Personnel, petitioner's appraisal was identical to Brent Hillman, a white candidate,

and her quality rating was the same as Darrell Axelson, Louis Collins, Virginia Gallo, Douglas Halleen, Olga Kelley, and Kenneth Morphy, all white candidates promoted (Plaintiff's Exhibit 13, Defendendant's Exhibit 12.a).

The District Court decision points out that there was no dispute that this Black petitioner would have risen to the GS-13 level had the position not become competitive (p. 5); however, under the law, qualifications were the same for career ladder and competitive positions. Therefore, had it not been for the fact the petitioner is Black, she too would have been promoted under the competitive system as white candidates were.

The District Court held that the respondent articulated a legitimate, non-discriminatory reason for not promoting petitioner to GS-13, that reason being, that the other candidates for promotion were more qualified. However, the law, unlike the respondent, is "color blind" when it comes to defining "excellent" and the "3" rating. Both white and Black candidates received the same appraisal sheets with the same definitions for "excellent" and the "3" ratings cannot under the law, be considered "more qualified" than this Black candidate with these same ratings.

Respondent's contention that petitioner was not promoted because an Appeals Council member, Joseph Doneghy, characterized her work as "very average" is clearly erroneous. Mr. Doneghy's comments have been consistent. He advised Investigator John Dowe and testified that he made no such remark about petitioner (Investigation Report Exhibit 21, EEO hearing transcript page, 78). No such comment is even documented in the record. It originated with

Bernardi, who has contradicted himself in testimony, and ended with his destruction of the written evidence upon which he alleges his recommendation is based. Such destruction was in clear violation of SSA Personnel Guides for Supervisors, Chapter IX, SSA Guide 1-4, TS No. g378,—Each agency *must* (emphasis added) maintain a temporary record of each promotion sufficient to allow reconstruction of the promotion action, including *documentation on how candidates were rated and ranked* (emphasis added)"

William Papovich's testimony that he would not be comfortable with petitioner reviewing the work of lower grade employees is pretextual, as petitioner has supervisory experience and SSA supervisory training, while neither Douglas Halleen, who was promoted from Papovich's branch on the 84-133 announcement, nor Marianne Julian, promoted from Papovich's branch on 85-156 announcement, had supervisory experience. Furthermore, nine of the 19 white candidates promoted did not have supervisory experience. They are shown in Plaintiff's Exhibit 13-B, D, H, J, K, L, M, O, and R;, as Karen R. Axelson, Mary B. France, Geraldine M. Grant, (Douglas Halleen, already mentioned), Brent B. Hillman, Carol A. Hyland, Olga Kelley, Kenneth N. Morphy, and Carl L. Warren.

Marian Julian, a white candidate on the 85-156 list who was promoted from Papovich's branch, was a GS-9 in October 1981 when he became her supervisor. He promoted her to GS-11 on March 7, 1982, and to GS-12 on March 30, 1983. During this period of time, she alleges no supervisory experience. Yet Papovich, "in his mind" was more comfortable with her as a GS-13 supervisor than he was with the black petitioner

who had supervised and had supervisory training. In her 03/20/83-09/30/83 appraisal, Ms. Julian was rated "fully satisfactory." In her next appraisal, 10/01/83-09/30/84, she had the same "fully satisfactory" rating and was not on the 84-133 BQ list although Papovich testified that he rated petitioner who was on this BQ list, lower than Ms. Julian (Plaintiff's Exhibit 6, p. 3, 7th from the bottom of page). Nevertheless, on her appraisal for the period 10/01/84-09/30/85, when petitioner's appraisal was lowered by error, preventing her from being on the 85-156 BQ list; and when she was not rated a "4" for production although her productivity scale was higher than some of the white candidates promoted (Plaintiff's Exhibit 20, first column, second from bottom).

The district court held that—"No one disputed that Gibson would have risen to the GS-13 level if it had not become a competitive position." However, qualification standards for career ladder promotions and competitive promotions are the same under the regulations (Plaintiff's Exhibit 24, pages 7 and 38). The district court incorrectly accepted respondent's contention that there is a difference in qualification requirements.

II. The District Court failed to address procedural abuses used in the selection process.

The burden rests upon Plaintiff/petitioner to show that the Defendant/respondent's justification for its decision is merely a pretext for discrimination through objective evidence that respondent's explanations for its actions lack credence, that procedures with which the decision was made are suspect, that there were irregularities in the procedures followed, that there were no "fixed or reasonably objective standards and

procedures for evaluating the applicant," and with statistical evidence supporting the inference of discrimination. *Warren v. Halstead Industries, Inc.*, 802 F.2d at 753, *citing United States Postal Service Board of Governors v. Aikens*, 460 U.S. at 714, n. 3; *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982)

Defendant/respondent's proferred reasons must be examined in the context of the several kinds of evidence presented by plaintiff. *Warren v. Halstead*, 802 F.2d at 753. When defendant's selection procedures include subjective criteria, the Court must closely scrutinize the criteria and the result of their application. *Love v. Alamance Co. Board of Education*, 757 F.2d 1504, 1506 (4th Cir. 1985). Subjective selection procedures, even if adopted for no particular discriminatory purpose, can nevertheless have a result that makes them the functional equivalent of intentional discrimination.

The promotional selection process, after Personnel certified the 53 names to Semans was not in accordance with the law, government-wide regulations, the SSA/AFGE National Agreement, Merit Promotion Plan and principles, memorandum of understandings and/or 5 USC Section 71. Therefore, this promotion selection process was not a legitimate, non-discriminatory procedure.

There were inconsistencies in the manner in which Semans obtained evidence from the Division Directors, which lead to inconsistencies in the evidence he used to make decisions as to who would or would not be promoted. These inconsistencies, therefore made the entire promotional selection process illegal.

On OHA 82-136, there were 15 vacancies, but only 18 names are on the BQL. This number is not in keeping with AFGE National Agreement Article 26, Section 10.B. "Establishing the Best-Qualified List." The 8 to 2 ratio (8+2 X 14=36) is not met and is only half of what it should be on the BQL). Section 10.D. provides for extension of the BQL, but we are unaware of any regulatory basis for decreasing it. If it were necessary to decrease it, it seems logical that the spirit of Section 10.D would be invoked, that is, the parties the Agency and the Union would agree through mutual consent. There is no indication in the record that this occurred.

OHA 83-100 had 8 vacancies, and the BQL total should have been 22. However, since they had more (24), the difference of two may have been caused by ties. This one is less significant than the above. The District Court's reference to the percentages for 53 candidates on the BQL, of which 5 were Black and 2 were hispanic (white hispanics) is acceptable. However, since petitioner's was removed from the BQL by Bernardi, it was technically removed from the 53 candidates on the BQL. Therefore, 52 candidates lowered to 4 the Blacks on the BQL and lowered the percentages from 13.21% of minorities on the BQL to 11.54 [52 on BQL, 6 minorities with the exclusion of Petitioner]. The fact that 15.79% of the selectees were minorities has nothing to do with Petitioner since she was not among those considered for promotion. 9.43% of the BQL candidates were Black would be lowered to 7.69% Blacks; and 10.53% of the Black selectees would have no bearing on Petitioner. In other words, is correct to consider her as one of the 53 candidates on the BQL and to con-

sider that she was one of the five Black candidates on the BQL when she had been *excluded* from further consideration by Bernardi through an illegal procedure, it is disparate treatment to continue considering her after this point in any percentages since she had been excluded.

Seman's testimonies and dispositions were "recollections" of what occurred, not the actual retained selection documents/evidence that was used. The fact that this promotional selection process could not be reconstructed served to discriminate against Petitioner, as neither she nor her counsel, not even this Court, can review and reconstruct what actually occurred as allowed for under SSA Personnel Guide for Supervisors, Chapter IX, SSA Guide 1-4, TS No. g378.

The respondent gave no reason at all why the 19 candidates were promoted over petitioner, as the respondent never compared her with the white male candidate who was promoted from her branch, or any of the other 18 candidates promoted. The District Court did not follow the letter of the law in finding that the defendant/respondent did make this comparison; and the defendant did not follow the law of the competitive selection procedure.

The fact that Semans recommended and/or promoted one minority to GS-15, and one minority to GS-13, does not remove the fact that for the period 1982 through 1986, he promoted no Blacks to GS-13 from Branch 17 and/or Division III.

The law requires that a temporary record, not contradictory subjective recollections, of each promotion be kept so that the promotion action can be recon-

structed (SSA Personnel Guide for Supervisors, Chapter IX, SSA Guide 1-4, TS No. g378). The Respondent violated this law by *destroying the evidence* used for these promotions.

The fact that the Respondent relied on contradictory subjective recollections in an attempt to justify a racial reason for passing over the Petitioner for promotion, demonstrates that the particular promotional selection practice used by the defendant served to create ***DISPARATE TREATMENT*** in violation of the U.S. Supreme Court decision in *Ward Cove Packing Co., Inc. v. Antonio,* U.S., 109 S. Ct. 2124 (1989); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1981), as amended in 1991; and applicable laws.

This particular promotional selection practice violated the law and allowed the Respondent to compare this Black Petitioner with a white employee from her branch who was not even on the best qualified list; compare her with a white applicant from her branch who was on the best qualified list but was not promoted at that time but later on another announcement; reframe from comparing her with the white male from her branch who was promoted; reframe from comparing her with the 52 candidates on the best qualified list; and reframe from comparing her with the 19 candidates selected for promotion to GS-13.

This particular promotional selection practice violated the law by requiring that in order for this Black candidate to be promoted to GS-13, she had to rank *one point* higher than the white candidate promoted even though they both had tied ratings. Such action serves to promote the premise that Blacks have to

be twice as qualified as whites applying for the same position. Such action also serves to show that different standards are used for Blacks than for whites. If a white candidate with the same identical "excellent" rating as this Black candidate is promoted, how does the "excellent" rating differ for this Black candidate.

This particular promotional selection practice that the Respondent testified had been used since it was instituted in November 1977 (District Court decision, page 5), violated the law and allowed the Respondent to destroy the main evidence used to make the final decision justifying the specific reason (s) for the promotional selections.

The district court held that—"Applicants who made the BQ List were required to submit a personal qualification statement, . . ." This statement is in error, as applicants had to submit their qualifications and any other material *before* names were certified on the BQ list. The Personnel Manual provides that—"If a vacancy announcement requires applicants to submit a copy of their appraisal and an employee fails to do so, the employee *must* (emphasis added) not receive credit for the "appraisal factor" (Plaintiff's Exhibit 24, page 17) Semans' selection procedure violated this regulation, as well as others (same exhibits, pages 10 and 16). He did not list his selection procedure on the vacancy announcement, and he sought no prior written approval as directed by regulations, prior to its implementation. Semans' direction to the division directors to obtain and consider material that was not a part of the promotional package prior to names being certified on the BQ list, also violated this regulation.

The district court held that—"Despite the paramount importance of quality, Petitioner relied extensively on a comparison of her overall evaluation to those selected." The district court erred in not finding that petitioner should have done the same and not randomly selected a GJT score to justify their action. The Personnel Manual provides that—"In applying qualification standards, *all of a candidate's experience must be considered* . . . (emphasis added)" (Plaintiff's Exhibit 24, page 32).

III. The District Court erred in accepting uncritically *inconsistent* subjective means for denying Petitioner's promotion.

Respondent's proffered reason for its failure to promote Petitioner, essentially that the capability of other candidates to perform as GS-13 analyst were superior to hers, is not credible as a legitimate non-discriminatory reason for its decision. *Texas Department of Community Affairs v. Burdine, supra.* Based on the evidence showing that respondent's selection practices were not carried out in accordance with agency rules and policies, that elimination and promotion of candidates was based on subjective criteria and standards unevenly applied, and that the result of these practices was to limit the chances of Black candidates to be promoted.

By Respondent's own statement, Petitioner was eliminated from further consideration from promotion based on a comparison with only one other actual candidate in her branch and her qualifications were never seriously considered in comparison to any other candidate or selectee. By Respondent's statements, candidates were recommended and Petitioner was eliminated on the basis of the vague, subjective cri-

terion "overall ability" apparently without reference to how overall ability was reflected in the available objective qualification ratings. Because of the shifting nature of Respondent's standards and criteria Petitioner was quickly and arbitrarily eliminated on the basis of their subjective judgment of overall ability and capability of performing as a GS-13.

When the at-issue process is subjective, "the legitimacy and non-discriminatory basis of the articulated reason for the decision may be subject to particularly close scrutiny by the trial judge." *Page v. Bolger*, 645 F.2d 227, 230 (4th Cir.), *cert denied*, 454 U.S. 892, 102 S. Ct. 388 (1981).

The result of the informal selection system based on subjective criteria used by Respondent was that no Black analysts were promoted in Ms. Gibson's division and proportionally few black analysts were promoted in OHA to GS-13 between 1982 and 1986. Based on evidence showing that the result of Respondent's informal selection procedure allowing division directors and branch chiefs to eliminate candidates without considering their objective qualifications was to limit the promotion opportunities of black candidates. Petitioner's division director never judged that a black analyst had superior capability of performing as a GS-13, and he recommended only white candidates for promotion.

Discriminatory animus can exist when no *overt* hostility is displayed toward the victim and where the affected individual cannot point to specific discriminatory conduct by the employer. *Segar v. Smith*, 738 F.2d 1249, 1278 (D.C. Cir. 1984), *cert denied*, 471 U.S. 1115 (1985).

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The critical inquiry in examining Respondent's reasons for denying Petitioner's promotion must focus on whether Respondent's decision was motivated by race both through direct and circumstantial evidence. The record is replete with evidentiary assumptions made by the Respondent regarding Petitioner's non-promotion that the facts do not compellingly establish. Petitioner urges that the spotlight of heightened scrutiny normally given to cases involving racial discrimination prompt this tribunal to grant the petition.

Respectfully submitted,

ROBERT M. ALEXANDER
2011 South Glebe Road
Arlington, VA 22204
(703) 920-7722
Counsel of Record
and Counsel for
Petitioner

Of Counsel:

GEORGE E. WALKER, PH.D., J.D.
2011 S. Glebe Road
Arlington, VA 22204
(703) 920-7722

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION No. 90-0936-A

THELMA L. GIBSON,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D., Secretary, Department of Health and Human Services,

Defendant.

ORDER

This is a Title VII disparate treatment case in which plaintiff, a black woman and GS-12 Hearings and Appeals Analyst in the Social Security Administration's Office of Hearings and Appeals (OHA), claims that she was denied promotion to a position as a GS-13 Hearings and Appeals Analyst because of her race. This matter is before the Court on two motions: 1) plaintiff's motion for partial summary judgment on subject matter jurisdiction, and 2) defendant's motion for summary judgment on the merits.

For the reasons stated below, the Court concludes 1) that plaintiff is entitled to partial summary judgement on defendant's jurisdictional defense as this Court properly has subject matter jurisdiction over this dispute; and 2) that summary judgment on the merits in favor of defendant is inappropriate because there are disputed issues of fact sufficient to enable a reasonable factfinder to infer that plaintiff was discriminated against. Each motion is treated separately.

I. Jurisdiction

Plaintiff's partial summary judgment motion stems from defendant's claim that subject matter jurisdiction is lacking because plaintiff failed to file this suit within 30 days of the Equal Employment Opportunity Commission's (EEOC) "final action." *See* 42 U.S.C. § 2000e-16(c). It is true that plaintiff filed her initial complaint in the United States District Court for the District of Columbia[1] several months after the EEOC's decision on the merits of her case. It is also true, however, that plaintiff filed a timely request for reconsideration with EEOC. Therafter, the complaint was filed within thirty days of the EEOC's denial of the reconsideration request. This is timely because the applicable EEOC regulations provide that a decision on the merits is final *unless* a party files a timely request for reconsideration. *See* 29 C.F.R. § 1613.234(b)(1) (1990) (adopted in 52 Fed. Reg. 41927 (October 30, 1987)). The regulations further provide that the decision on the reconsideration request becomes the "final" agency action. *See* 29 C.F.R. § 1613.235(d).

At oral argument, counsel for defendant essentially conceded jurisdiction. Nevertheless, defense counsel felt compelled to raise *Birch v. Lehman*, 677 F.2d 1006 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983), in which the Fourth Circuit held, prior to the adoption of the current regulations, that final agency action was the EEOC's decision to deny appeal, not the denial of any subsequent reconsideration request. Under the revised regulations adopted in 1987, however, *Birch* is inapplicable. The rationale for that decision was the Fourth Circuit panel's understandable concern that, because the plaintiff was not given a time limit within which to request reconsideration, no EEOC decision could be regarded with certainty as final agency action. In this circumstance, the thirty-day

[1] This case was transferred to this District purusuant to 28 U.S.C. § 1404(a).

time limit for filing in federal court would be rendered meaningless. *See* 677 F.2d at 1007-08. Under the current regulations, however, reconsideration requests must be filed within thirty days of receipt of the decision on the merits. *See* 29 C.F.R. §§ 1613.234(b)(1), 1613.235(b). Thus, under the current scheme, a complaint is timely if filed in court within thirty days of the agency's denial of the reconsideration request. In this instance, plaintiff's request for reconsideration was filed within thrity days of the issuance of the agency's decision, and the complaint thereafter was filed within thirty days following the agency's denial of the reconsideration request. The complaint therefore was timely filed. Accordingly, plaintiff's motion for partial summary judgment on subject matter jurisdiction must be, and hereby is, GRANTED.

II. Merits

1. In October 1984, OHA issued a promotion announcement, Number 133, for 19 temporary GS-13 Hearing and Appeals Analyst vacancies. The announcement was restricted to OHA headquarters employees, a category that included plaintiff.

2. Applicants were first required to submit personal qualifications statements. Minimum qualifications and ranking points were determined on the basis of these statements by a promotion panel appointed by the personnel office. The office established a cutoff score, and those candidates who attained the minimum score were placed on a "Best Qualified" (BQ) list. This was the "objective" portion of the promotion process. Plaintiff was one of 53 Appeals Analysts placed on the BQ list for the 19 positions in question.

3. Those who met the minimum qualifications were further evaluated on a "subjective" basis. Any points accumulated above the cutoff minimum were dropped, and an alphabetical listing of the BQ candidates was sent to the se-

lecting official, Edwin Semans. He requested input from the Division Directors, who in turn consulted both their Branch Chiefs and the Appeals Council members to whom the individual analysts submitted the bulk of their work.

4. Twenty Appeals Analysts made the BQ list from Division III, plaintiff's division, of which Joseph Bernardi was the director. Plaintiff's immediate supervisor was Branch Chief William Papovich. He ranked plaintiff third, behind two other BQ candidates from his branch, both of whom are white. After receiving input from Papovich and Joseph Doneghy, the Appeals Council member to whom plaintiff submitted most of her written work, Bernardi forwarded a list of the top ten BQ candidates from the division to Semans. Plaintiff was not on this top ten list.

5. Of the 19 persons ultimately selected for promotion, it appears to be undisputed that 17 successful candidates were white and 2 black. Seven of the white selectees had objective qualifications scores lower than plaintiff's.

6. Papovich states by way of declaration that while plaintiff was generally qualified for the GS-13 position and was a productive worker, he ranked plaintiff behind two other analysts in the branch because her writing and analytical skills were inferior to theirs. Bernardi states that he relied primarily on the recommendation of Papovich, but he also took into account Doneghy's rating of plaintiff's work as average in quality. Bernardi also states that plaintiff was among the lowest BQ candidates from his division in terms of the 1-10 (1 = low, 10 = high) scale that Bernardi requested that his Branch Chiefs employ. Seman's declaration states that plaintiff was not selected because, based on Bernardi and Papovich's input, she simply was not ranked as highly as other candidates.

7. Title VII disparate treatment analysis is well established. To establish a prima facie case of employment discrimination, the plaintiff must show that (1) she belongs to a racial minority, (2) she applied for and was qualified

for a job for which she was rejected, (3) she was rejected despite her qualifications, and (4) that the job remained open for others with similiar qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *United States v. Chesterfield County School Dist.*, 484 F.2d 70 (4th Cir. 1973).[2] When the position is filled at the time the plaintiff is rejected, the plaintiff must show "some evidence that race was a determining factor in the employer's decision" not to promote her. *Holmes v. Bevilacqua*, 794 F.2d 142, 147 (4th Cir. 1986). This evidence may consist of direct evidence of discrimination or indirect evidence whose cumulative probative force supports as a reasonable probability the inference that but for her race she would have been selected. *See Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 242 (4th Cir. 1982).

8. If a prima face case is established, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the challenged action. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981); *McDonnell*, 411 U.S. at 802. The plaintiff must then show that the reason articulated by the defendant is a mere pretext for discrimination. *Burdine*, 450 U.S. at 256; *McDonnell*, 411 U.S. at 804. Thus, not only must plaintiff establish a prima face case, but she retains the final burden of rebutting the nondiscrimnatory reason proffered by the defendant. *See Burdine*, 450 U.S. at 256; *Autry v. North Carolina Dept. of Human Resources*, 820 F.2d 1384 (4th Cir. 1987).[3]

---

[2] The *McDonnell Douglas* model for setting forth a prima facie case need not apply where a plaintiff produces direct evidence of discrimination. There is no direct evidence of discrimination here. Nor does plaintiff offer any evidence suggesting racial animus on the part of Semans, Bernardi, or Papovich.

[3] In this as in other civil cases, plaintiff bears the burden of establishing her case by a preponderance of the evidence. *Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985).

9. Plaintiff has established beyond dispute the first three elements of her prima facie case. Defendant argues, presumably based on the fourth condition, that there is no prima facie case. Because defendant itself has produced evidence of a non-discriminatory reason for less favorable treatment of plaintiff, however, the establishment of the prima facie case by means of the fourth element is no longer relevant. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). Analysis proceeds to determination of the ultimate factual issue: did the employer intentionally discriminate against plaintiff. *See* id.; Schlei & Grossman, Employment Discrimination Law 479-84 (2d. ed. Supp. 1989). In this context, the question becomes whether there are material issues of fact in dispute concerning whether defendant's asserted non-discriminatory reason, the comparison of plaintiff's skills to those of the other candidates, is pretextual.

10. Plaintiff advances essentially four arguments bearing on the pretext issue. Two of these are sufficient to preclude summary judgment.[4] First, plaintiff cites inconsistencies in the testimony of the key decisionmakers—Semans, Bernardi, and Papovich—which, in her view, undermine the credibility of defendant's claim that she was denied promotion on the basis of a comparison of her job skills with the skills of other candidates. Whether these inconsistencies rise to the level of a material showing of discriminatory animus is not clear at this stage. With respect to summary judgment, however, plaintiff need only raise a disputed issue as to whether defendant's rationale was pretextual. In this context, the existence of credibility issues weighs against the granting of summary judgment. *See White v. Federal Express Corp.*, 729 F. Supp. 1536, 1555 (E.D. Va. 1990); *see also Warren v. Halstead Industries*, 802 F.2d 746, 753 (4th Cir. 1986) ("numerous inconsistencies and conflicting documentary evidence [may]

---

[4] Given this, the Court does not reach plaintiff's other grounds.

render the [defendant's] story unreliable"), *rev'd in part, aff'd in pertinent part*, 835 F.2d 535 (4th Cir.) (*en banc*) (*per curiam*), *cert. denied*, 487 U.S. 1218 (1988). Viewing the evidence in the light most favorable to the nonmoving party, a factfinder could believe that defendant's articulated rationale for decision was created after the fact in order to obscure other factors that may have influenced the decision.

11. Second, plaintiff contends that the overall selection methodology employed by defendant invites the inference that defendant's articulated nondiscriminatory rationale is pretextual. She argues that she was not compared to candidates from the other OHA divisions but only to two candidates in her own branch, and because Papovich's recommendation was given so much weight in the process this branch comparison was essentially dispositive. Ultimately, this contention may prove inadequate to establish that but for her race she would have been promoted. *See* Employment Discrimination Law at 483-84 (Supp. 1989) (summarizing applicable causation standard). Nevertheless, at this stage the Court concludes that a rational factfinder, keeping in mind the caution necessary to an evaluation of intent and motive in the context of a subjective evaluation,[5] could infer that defendant's articulated rationale for decision was pretextual. Because "reasonable minds could differ as to the import of the evidence," *Anderson v. Lib-*

---

[5] The Fourth Circuit has made clear that trial courts should be cautious in disposing of Title VII cases summarily because intent and motive are often at the heart of the case. *See Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1005 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 232 (1987); *see also Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829 (1985); *Simmons v. Marsh*, 690 F. Supp. 1489, 1491 n. 13 (E.D. Va. 1988), *aff'd*, 852 F.2d 566 (4th Cir. 1988). The Fourth Circuit has also concluded that the legitimacy of an employer's articulated reason for decision is subject to particularly close scrutiny when the decision is based on subjective criteria or standards. *See Love v. Alamance County Board of Education*, 757 F.2d 1504 (4th Cir. 1985).

erty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986), summary judgment is inappropriate. Defendant's motion must therefore be, and hereby is, DENIED.

The Clerk is directed to forward a copy of this Order to all counsel of record.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
December 3, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 90-0936-A

THELMA L. GIBSON,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D., Secretary, Department of Health and Human Services.

Defendant.

FILED FEB 20 1991
CLERK U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

ORDER

In accordance with the accompanying Memorandum Opinion, it is ORDERED:

(1) that Judgment be, and it hereby is, ENTERED in favor of the Defendant and against the Plaintiff on Plaintiff's Amended Complaint. Plaintiff's Amended Complaint is DISMISSED with prejudice;

(2) that the Clerk shall forward copies of this Order together with the accompanying Memorandum Opinion to all counsel or record.

Dated: February 20, 1991
Alexandria, Virginia

/s/ James C. Cacheris
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CIVIL ACTION NO. 90-0936-A

THELMA L. GIBSON,

Plaintiff,

v.

LOUIS W. SULLIVAN, M.D., Secretary, Department of Health and Human Services,

Defendant.

FILED FEB 20 1991
CLERK U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

MEMORANDUM OPINION

In her amended complaint, plaintiff Thelma L. Gibson ("Gibson"), a black female, alleged that she was denied a promotion to GS-13 Hearings and Appeals Analyst with the Social Security Administration's (SSA) Office of Hearings and Appeals because of her race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1981), as amended. The defendant, Louis W. Sullivan, M.D., Secretary of the Department of Health and Human Services, denied plaintiff's claim and alleged that the people selected for promotion were better qualified.[1] At trial,

---

[1] The defendant also raised the defense of lack of subject matter jurisdiction. Judge Ellis entered an Order dated December 3, 1990 granting plaintiff 18 Motion for Partial Summary Judgment on the subject matter jurisdiction defense.

the defendant orally stipulated that a *prima facie* case of discrimination had been established; therefore, the court heard the defendant's reasons for denying the promotion and the plaintiff's evidence of pretext. For the reasons set forth below, judgment is entered for the defendant.

I. JURISDICTION

This court has jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16.

II. FINDINGS OF FACT

After reviewing the pleadings, evidence and arguments o counsel, the court finds the facts as follows:

A. Background

Plaintiff Thelma L. Gibson is a black female. She is a high school graduate, she attended the Kentucky State College for two years, and she earned both A.S. and B.S. Degrees in business administration from Southeast University in Washington, D.C. (Gibson testimony; plaintiff's exhibit 1). She started working for the SSA's Office of Hearings and Appeals as a clerk/stenographer on July 1, 1963. On September 11, 1977, she became a GS-12 Hearing and Appeals Analyst. (Gibson testimony, plaintiff's exhibit 1). This case concerns her attempt to rise one level higher, to GS-13 Hearing and Appeals Analyst.

Defendant Louis W. Sullivan, M.D., is Secretary of the Department of Health and Human Services. (Gibson testimony). Gibson has alleged that several of Sullivan's subordinates in the Office of Appeals Operations collectively discriminated against her. Descending down the ladder of authority, these individuals are Edwin Semans, Jr., Director of the Office Appeals Operations; Joseph Bernardi, Director of Division III, and William Papovich, the Chief of Branch 17. All three are white males.

B. Defendant's Organization

The largest relevant unit within the SSA is the Office of Hearings and Appeals ("OHA"). Among other things, OHA contains the Office of Appeals Operations ("OAO"), of which Semans was the Director from 1973 until his retirement in August 1987. (Semans testimony). The OAO also contains an Appeals Council, which consists of approximately 18 to 20 members who adjudicate appeals arising from decisions made by administrative law judges. (Semans testimony).

The OHA has five Divisions. Divisions I, II, and III deal with disability cases, Division IV deals with retirement and survivors' benefits, and Division V deals with civil actions. The Director of Division III was Joseph Bernardi. Bernardi oversaw eight branch chiefs and about 120 employees. (Gibson, Bernardi testimony). The divisions were subdivided into 30 branches, 23 of which handled disability cases. (Semans testimony). In 1984, the plaintiff was employed in Division III, Branch 17. William Papovich was her Branch Chief. (Gibson, Bernardi, Papovich testimony).

In 1984, the plaintiff was employed as a GS-12 Appeals Analyst. (Gibson testimony, plaintiff's exhibit 1). Appeals Analysts make recommendations to the Appeals Council regarding the disposition of appeals to that body. The analyst might recommend that the appeal of the ALJ's decision be dismissed, or that the Council revise the prior decision, or that the Council review the case on its own motion. (Gibson testimony).

Gibson handled approximately 30 cases a month. In all but several of these cases, the defendant would recommend denial of the appeal. These recommendations were relatively short—a one to three page form on which the analyst checked appropriate boxes and wrote two or three paragraphs explaining why the claimant was not disabled. In writing such a rationale, Gibson often would use the Office of Hearings and Appeals' Manual of Standardized Text to

supply stock paragraphs which addressed recurring issues. This was a standard procedure for GS-12 analysts. However, in several cases a month, Gibson would write a "long-form" recommendation. These recommendations were four to six pages in length and contained much longer prose rationale sections. Stock paragraphs were less useful in writing these recommendations. (Gibson testimony, plaintiff's exhibit 8).

In October 1984, the Office of Hearings and Appeals ("OHA") issued Vacancy Announcement No. Va.-OHA-84-133, which announced promotion vacancies at the GS-13 level. The opening date was October 31, 1984, and the closing date was November 6, 1984. (Plaintiff's Exh. 4; Patricia Rocheford testimony).

The GS-13 Appeals Analyst position involved many of the same functions as the GS-12. Yet, GS-13 duties generally required more skill. A GS-13 would receive the more complex cases, work on cases in civil litigation, and review and train GS-12 analysts. (Albert Carrozza testimony, Plaintiff's exhibit 9). When Gibson became a GS-12 analyst, promotion to GS-13 was awarded as a matter of course in due time if the analyst's work was satisfactory. (Semans testimony). However, in November 1977, GS-13 was switched from a journeyman's position to a competitive promotion based upon merit. (Semans testimony).[2] No one

---

[2] There was conflicting testimony regarding when the GS-13 appeals analyst position switched from a journeyman's position to a competitive position. Semans testified that the change occurred during November of 1977. Gibson testified on direct examination that the change occurred in September 1980, and on cross-examination, she stated that the change occurred in 1978. Albert Carrozza, a GS-13 appeals analyst and a "chief steward" union officer, testified that the change occurred in 1984. The change must have occurred before 1984, because that was the year of the at-issue promotion, and Gibson testified that she had been frustrated by several denials of promotion by this point. (Testimony of Gibson). The court has selected Semans testimony that the change occurred in November 1977 since he was the selecting official for GS-13 promotions

disputed that Gibson would have risen to the GS-13 level if it had not become a competitive position.

C. The Promotion Process

Under the system instituted in 1977, the promotion process was divided into two separate halves. The first phase was objective; all of the candidates who met certain objective criteria were placed on a "Best Qualified List". ("BQ List"). In the second phase, everyone on this list was evaluated subjectively. (Gibson testimony).

1. Objective Phase / The "Best Qualified" List

Only applicants who had demonstrated a requisite level of past performance made the BQ List. A BQ List score was composed by totalling numerical points awarded for categories such as quality of work and productivity. (Plaintiff's exhibit 5). The required BQ List score varied from opening to opening; the more spaces that were available, the lower the BQ List score that was necessary to advance to the second stage. (Rocheford testimony). Yet, once the BQ List was set, the slate was wiped clean, 60 that each of the remaining candidates was given a fresh evaluation in the subjective phase. (Semans, Bernardi, Rocheford testimony).

In this instance, the minimum BQ List score was 90 (Rocheford testimony), and Gibson met this minimum. Both parties spent significant time producing evidence regarding Gibson's BQ List score. Yet, Semans, Bernardi and Papovich were not provided these scores, and the scores were not considered in the subjective evaluation process. (Semans, Bernardi, Rocheford testimony). Since the issue is whether Semans, Bernardi and Papovich intentionally denied Gibson promotion because of her race, this evidence is entitled to little weight, although it does provide some

---

from 1973 to 1987. Yet any conflict in the testimony regarding the precise date of this change is not material.

objective evaluation of Gibson in relation to other candidates. Also, these scores were not as inclusive as the subjective criteria that were allegedly employed.

According to Patricia Rocheford, a Personnel Staff Specialist with the SSA, the relevant rating period for this promotion was the 1982-83 appraisal. (Rocheford testimony). In an appraisal, the worker is evaluated on the quantity and quality of the work produced. Based upon performance criteria, each worker is rated on a scale of "1" to "4" for quality of work, quantity of work, and other criteria: "4" represented "outstanding", "3" represented "excellent", and "2" represented "fully satisfactory". Based upon these scores, an overall rating on the "1" to "4" scale is calculated. (Rocheford testimony). For the 1982-83 appraisal period, Gibson was rated as a "3" in both quantity and quality factors. (Gibson testimony, plaintiff's exhibit 1). Out of the 53 people that made the BQ List for this promotion, 21 were rated as "outstanding," 31 were "excellent" (including Gibson), and one was "fully satisfactory." Out of the 19 people that were promoted, 12 were rated "outstanding," 6 were "excellent," and 1 was "fully satisfactory." (Rocheford testimony, plaintiff's exhibit 7, defendant's exhibit 9).

Based upon her 1982-83 evaluation and other factors, Gibson originally had a BQ List score of 89, one point shy of the cutoff. However, after Gibson submitted a letter which documented that she had won an award for productivity, her score was raised to 92. (Gibson testimony). Of the 53 people in the BQ List, 5 were black and 2 were hispanic. Of the 19 people selected, 17 were white and 2 were black and one was hispanic. Of the 17 white people selected, two had BQ List scores lower than Gibson. The two blacks selected, Sara Tapscott and Annie McLaurin, had BQ List scores of 92 and 104, respectively. (Plaintiff's exhibit 31).

2. Subjective Phase / Selections From The BQ List

As noted above, in the second stage the BQ List scores were set aside and the subjective evaluation process began. Applicants who made the BQ List were required to submit a personal qualification statement, and Gibson complied. (Plaintiff's exhibit 1).

Semans was the selecting official for this round of promotions, and he was sent a list of the 53 candidates on the BQ List (without scores). Semans turned to his Division Directors and supplied each with a copy of the BQ List. (Semans testimony).

Semans asked his division directors to provide him with an overall evaluation of the candidates for GS-13. The directors were to examine writing ability, quality of work, productivity, and the results of the latest appraisal. In executing this task, the division directors were instructed to consult with their branch chiefs and with the Appeals Council members to whom the appeals analyst had submitted the bulk of his work. (Semans testimony). In accordance with this directive, Division III Director Bernardi asked his branch chiefs for an assessment of the promotion candidates from their respective branches and consulted with Appeals Council members. This information was relayed back to Semans in the form of a ranking of the candidates from each division. While Semans made the final selections, his choices were not based upon his personal knowledge of the candidates. He placed great weight on the recommendations of the division directors due to the number of candidates and the size of his domain. (Carrozza, Semans testimony).

D. Defendant's Reasons for Not Promoting Gibson

Semans, Bernardi and Papovich each testified as part of the government's case. When Semans began this selection process, he cast the responsibility for evaluating the BQ List candidates down to the branch chief level,

and then the evaluations worked their way back to Semans. (Semans, Carrozza, Bernardi testimony). For that reason, this summary starts at the bottom.

William Papovich was Gibson's Branch Chief from 1981 until 1987, when he retired. Papovich had three people in his branch who were on the 1984 BQ List (Doug Halleen, Mary Fischer and Gibson), and he was asked by Division Director Bernardi to rank them. (Papovich testimony). Papovich testified that, in an oral report to Bernardi, he ranked the candidates in the following order of preference: Halleen, Fischer, then Gibson. (Bernardi, Papovich testimony). Both Halleen and Fischer are white. (Papovich testimony).

According to his testimony, Papovich recommended Halleen first because Halleen was "one of the best." He was well versed in technical matters, he was quite productive, and he was a good writer. Fischer was chosen second, despite the fact that she was a comparatively new analyst, because of her promising abilities. Papovich recalled that Fischer had a high degree of technical knowledge of the statutes, rules and procedures, and she was a quick learner. (Papovich testimony).

Papovich approved of Gibson's work, but she was clearly third-place in his eyes. Gibson was described as "diligent," "efficient," and "technically competent." Her writing ability was not on par with Halleen's and Fischer's, and she had problems with syntax, awkward phrasing and grammar. In addition, Papovich was concerned about Gibson reviewing the work of lower grade appeals analysts, which was a responsibility assumed upon becoming a GS-13 appeals analyst. (Papovich testimony). Upon assessing Papovich's credibility and the substance of his testimony, the court is satisfied that Halleen and Fischer were more qualified for promotion.

One matter relating to this ranking is noteworthy. In Papovich's affidavit describing his role in the affair, he

described his ranking in race-based terms: "I told Mr. Bernardi that I ranked Ms. Gibson third behind two other females. The two other females were Caucasian." (Defendant's exhibit 12(a), p.146). This statement was factually incorrect, in that one of the candidates, Doug Halleen, is male. Yet, beyond that error regarding gender, one would expect an affiant in a case alleging racism to disclose the race of all of the parties concerned; therefore, the court does not find that Papovich's statement had a racist hue. The fact that Papovich did not correctly recall the gender of one of the candidates may impugn his memory, but not his credibility. Papovich's opinion of Gibson's abilities was reflected in the assignments that he gave to her. For example, "Medicare provider cases" were especially complex. Papovich testified that he had assigned several of these to Halleen, that he "probably" had not assigned any to Fischer, and that he definitely had not assigned any to Gibson. (Papovich testimony).

Most importantly, Papovich testified that he did not discriminate against Gibson because of her race. This claimed lack of racial animus was reflected in an award Gibson received. In August 1984, she received an award for "sustained superior performance" as a result of Papovich's nomination. (Gibson testimony; Plaintiff's Exh. 1). This award was geared more toward high productivity than quality of product. (Papovich testimony). Furthermore, Papovich stated that although his opinion of Gibson's abilities was lower than that of Halleen and Fischer, he felt that Gibson should be promoted to GS-13 at some time in the future. (Papovich testimony).

After Papovich's evaluation, the matter was considered by Division III Director Bernardi. Bernardi testified that his recommendations to Semans regarding promotions were largely based on Papovich's evaluation. Bernardi recalled that Gibson had been ranked third out of the three individuals in Branch 17. He stated that Papovich, in an oral report, had rated the candidates on a scale of 1 to 10, 10

being the best. One candidate was rated a "10", one was rated a "9" or "9 1/2", and Gibson was rated the lowest with an "8 1/2." (Bernardi testimony).

Aside from Papovich's comments, Bernardi gathered other information regarding Gibson's qualifications. As part of his investigation, Bernardi spoke with a member of the Appeals Council, Joseph Doneghy. Doneghy stated to Bernardi that Gibson's work was "average" in quality, and that it was not up to the standard achieved by many other analysts. Bernardi placed more stock in Doneghy's opinion than most members of the Appeals Council. In his view, most of the Appeals Council members were either uniformly praiseworthy or critical of the appeals analysts who they had observed. Thus, they were not good barometers of ability. On the other hand, Doneghy's assessment was well-tailored to each analyst, and he was well-respected by his peers. Doneghy is a black man. (Bernardi testimony). As an aside, the court notes that Bernardi once served as Gibson's branch chief (Bernardi testimony), although he did not testify that his recommendation was based upon any first-hand experience with Gibson.

Most importantly, Bernardi testified that he did not discriminate against Gibson on the basis of her race. Bernardi also testified about some events that make him an unlikely racist. In 1985, he won an "Equal Opportunity Award" for his promotion of the spirit of equal opportunity for minorities. He had been nominated for this award by Mel Christian, a black man. Bernardi had recommended promoting Christian from GS-13 appeals analyst to branch chief. Bernardi had also nominated Tommy Smith, a black man, for a promotion to GS-13 appeals analyst. (Bernardi testimony).

In addition, Bernardi testified about an incident that was not addressed by any other witness. He claimed that after Gibson began her administrative claim of discrimination, he had a conversation with her. Allegedly, she said that

she did not feel that Bernardi or Papovich had discriminated against her, but that she felt that Semans held a grudge against her due to some past incident. Bernardi did not identify the nature of the alleged incident, and it is not known whether Gibson identified it to Bernardi. (Bernardi testimony).

Bernardi testified that based upon Papovich's recommendation and his own investigation, he provided to Semans a ranking of the top ten BQ List individuals from Division III out of the twenty that made the List. Gibson was not in the top ten. (Bernardi testimony).

The final decision was made by Semans. He placed great weight on the recommendations of his subordinates. He testified that he did not choose Gibson for promotion because she was ranked low by her division director, because she did not receive a "4" on her most recent quality evaluation, and because an appeals council member (Doneghy) said her work was "average." While she would have been acceptable, Semans felt that other applicants were more qualified. Semans denied that Gibson was not promoted because of her race. (Semans testimony).

It should be noted that Semans stated that Gibson was eighteenth or nineteenth in Bernardi's ranking, and yet Bernardi testified that he only ranked the top ten individuals from Division III. (Semans, Bernardi testimony). While these statements are inconsistent, the court does not draw any malevolent inference from them. Even if Bernardi had only supplied a top ten ranking, it is likely that Gibson's status was discussed. Bernardi testified that he had told Semans that he did-not think that Gibson would be able to make GS-13 in a merit-based competition. Yet, Bernardi claimed that he told Semans that Gibson should be promoted the next time around in order to reward her diligence, even if others were more qualified. As both Semans and Bernardi testified, Semans responded that he would acquiesce to Bernardi in such a decision,

but Gibson would not be a "bonus pick"; Bernardi would have to choose Gibson over more qualified candidates. (Bernardi, Semans testimony). Yet, when the next GS-13 promotion came around, Gibson's name was not on the BQ List. Bernardi called the personnel department to find out why, and he was told that Gibson did not apply. (Bernardi testimony). Bernardi never told Gibson of his desire to promote her because it was "privileged management information." (Bernardi testimony).

Like Bernardi, Semans had also taken actions in the past that are inconsistent with racism. Semans testified that he had recommended the promotion of blacks to serve under him as GS-14's and GS-15's, and that these recommendations were followed. (Semans testimony; Semans' Affidavit).

E. Plaintiff's Evidence Regarding Pretext

As Gibson's counsel admitted, there was no direct evidence of racial discrimination by Semans, Bernardi or Papovich. Indeed, Gibson testified that neither Papovich nor Bernardi ever displayed any hostility toward her and both were always nice to her. Instead, Gibson claimed a gut feeling that she had been passed over because of her race. (Gibson testimony).

In order to prevail, Gibson had to undermine the credibility of the Semans/Bernardi/Papovich triad. Yet, the court finds that their testimony was worthy of credence; their testimony was very consistent and the court believed that these individuals were telling the truth. This does not mean that the court did not believe Gibson. There were no material conflicts in the testimony regarding the events at issue. The question was whether Gibson had produced enough circumstantial evidence to prove that the defendant's reasons for not promoting her were merely a pretext for discrimination. In the final addition, the plaintiff's circumstantial evidence amounted to almost nothing.

The plaintiff's primary evidence of pretext was composed of statistics. The plaintiff claimed that a disproportionately low number of black GS-12 appeals analysts were promoted to GS-13, and argued that this statistic created an inference of discrimination which could serve as proof of pretext. Yet, as noted in the conclusions of law that follow, statistics are not very probative of the issue of pretext in a disparate treatment case. For that reason, the statistical evidence will not be discussed in detail.

The statistics were offered into evidence by Kathy Spoone, who is the plaintiff's attorney's paralegal. (Spoone testimony). Although Spoone was a lay witness (she was not listed on the pretrial order as an expert), she testified about several statistical comparisons which she compiled. These were offered as plaintiff's exhibits 30 through 40, and every exhibit except number 40 was admitted into evidence.

Exhibit 30 cataloged the candidates who made the BQ List. Exhibits 31 through 36 compared Gibson to other applicants in terms of experience and "overall rating." Notably, no comparison was made for quality alone, which was the paramount factor in promotions decisions. (Semans testimony).

Exhibits 37 through 40 addressed the statistical balance of blacks and whites, and each of these exhibits merely recast the same numbers from different angles. Exhibit 37 indexed the GS-12 and GS-13 appeals analysts by race and GS level. Exhibit 38 calculated the percentage of GS-12 and GS-13 analysts that were black, in order to show that the percentage of black GS-13 analysts was lower than the percentage of black GS-12 analysts. Exhibit 39 projected the percentage of current black GS-12 analysts into an equal percentage of black GS-13 analysts, and then calculated the shortfall between the projection and reality. It is not necessary to regurgitate each of these statistics; it is sufficient to say that in 1984 (the promotion year),

20.8% (35 of 168) of the GS-12 appeals analysts were black, and 15.6% (27 of 172) of the GS-13 appeals analysts were black. (Plaintiff's exhibit 38).

Finally, Exhibit 40 purported to calculated the "Probability of as few Blacks [in the GS-13 ranks] occurring by Chance." The court excluded exhibit 40 because it involved a complex mathematical calculation which required an expert witness. Since Spoone did not have first-hand knowledge of the underlying facts, she could not testify as a lay witness competent to render an opinion based upon her prior experience and education. *MCI v. Wanzer Telecommunications Co.*, 897 F.2d 703, 706 (4th Cir. 1990). Spoone was not allowed to testify an expert because she was not listed as an expert on the plaintiff's pretrial list of witnesses.

Aside from this statistical presentation, the plaintiff presented practically nothing to rebut the defendant's reason for not promoting her. In this regard, four pieces of evidence deserve brief mention.

First, Gibson testified that she never received any criticism of her writing. Furthermore, Gibson claimed that she spoke with Appeals Council member Doneghy after the selection process was over, and that Doneghy said that he had mistaken Gibson for another person, and that her writing was fine, not "average." (Gibson testimony). Even if this is true, at best it demonstrates that Doneghy was mistaken in the information he offered to Bernardi; it does not demonstrate that anyone involved in the selection process had a racial animus.

Second, Gibson testified that white GS-12 analysts (such as Mary Fischer) were given "downtime" to work on special projects, and Gibson inferred that analysts who completed these projects earned brownie points towards promotion. Gibson surmised that this was a covert attempt to coach white GS-12 analysts through the promotion process, while holding down black analysts in their GS-12 slots.

(Gibson testimony). Even if Gibson was correct in her observation that white employees were given special projects, her inference is unwarranted. As Gibson admitted, she never volunteered to be trained to work on Medicare cases (Gibson testimony), which were harder to handle than the disability cases which Gibson analyzed. (Papovich testimony). Gibson claimed that she did not volunteer because she preferred the nature of disability cases. (Gibson testimony). Yet, this refusal puts Gibson in the contradictory position of asserting that she did not receive an opportunity to earn brownie points by handling special cases when she declined the opportunity to do just that by accepting training for Medicare cases.

Third, Gibson claims that after this selection process was over, she inquired to Semans as to why she was not selected and received no response. (Gibson testimony). Gibson did not indicate the means by which she made this inquiry. Nonetheless, the court perceives that Gibson is inferring that Semans was hostile to her desires for promotion, perhaps for a racial reason. This sort of inference is quite tenuous, and it does not comport well with Gibson's theory of the case. She argued that Semans rubberstamped the recommendations of Bernardi and Papovich (Gibson, Carrozza testimony), and that their subjective evaluations were racially biased against her. If Semans was indeed aloof, then it is not reasonable to infer that he was also hostile.

Finally, Gibson testified that Papovich told her that Bernardi told him that she was transferred to Branch 17 in 1971 in order to equalize the number of blacks in each division. (Gibson testimony). Neither Bernardi nor Papovich was examined or cross-examined about this alleged incident. Even if the court assumed that this actually took place, the incident could be interpreted as benevolent or malevolent. Under a benevolent scenario, the number of blacks in each division might have been equalized in order to reduce the competition between blacks for promotion.

Under a malevolent scenario, this could have been an attempt to spread out people seen as undesirable due to their race. Since there was no further testimony regarding this incident, the court does not draw any inference from it, because such an attempt would be totally speculative.

III. CONCLUSIONS OF LAW

A. Title VII and Disparate Treatment Cases

As established in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), there are two ways to prove discriminatory treatment—by direct or indirect evidence. With the latter method, the plaintiff must establish a *prima facie* case by satisfying a four-factor test. If this is established, the defendant has the burden of producing (but not proving) a "legitimate, non-discriminatory reason" for its action. If that burden is met, then the plaintiff has the ultimate burden of proving by a preponderance of the evidence that the action would not taken place but for the plaintiff' 5 race. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1094-95 (1981).

In order to establish a *prima facie* case, the plaintiff must prove the existence of these four factors by a preponderance of the evidence: "(i) that he belongs to a racial minority; (ii) that he applied for and was qualified for job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications." *McDonnell Douglas*, 93 S.Ct. at 1824. Since no vacancy remained open in the case at bar, under this fourth factor, the plaintiff must prove the circumstances of the action taken against him "give rise to an inference of unlawful discrimination." *Burdine*, 101 S.Ct. at 1094 (19813. This inference must be strong enough to persuade a reasonable person that the action was more

likely than not the product of discrimination. *Id.* This burden is "not onerous." *Id.*

As noted above, the government stipulated that the plaintiff had established a *prima facie* case. Given that concession, the court will only examine whether the government articulated a legitimate, non-discriminatory reason for not promoting Gibson, and, if so, whether Gibson proved that the government's reason was a mere pretext for discrimination.

The court finds that the government met its burden of production. It produced evidence which, if true, indicated that Gibson was not promoted because the quality of her work was inferior to quality of the work for those who were promoted. While Gibson was a good, productive worker of long standing, she did not have the analytical skills or writing ability to win in the intense competition for promotion.

Since the government has met its burden of production, the ultimate burden returns to the plaintiff. Although the *prima facie* case is rebutted, the evidence offered by the plaintiff to establish that presumption is not ignored. Instead, all of the evidence is considered in deciding whether the plaintiff has carried the ultimate burden of proof. *Burdine*, 101 S.Ct. at 1094.

In the case at bar, two special kinds of evidence were offered: the statistical evidence concerning the percentage of blacks at the GS-12 and GS-13 level, and the government's use of a subjective evaluation process. These categories of evidence must be evaluated carefully in a disparate treatment case.

B. The Use of Statistical Evidence in a Disparate Treatment Case

It is unusual for a plaintiff to rely so extensively on statistics in a discriminatory treatment case, as opposed to a discriminatory impact case. In a treatment case, while

statistics comparing the success of black and white employees are not irrelevant, they are not entitled to great weight in most instances. *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1253 (7th Cir. 1990). Statistics may be helpful in determining whether the defendant's actions "conformed to a general pattern of discrimination against blacks." *McDonnell Douglas*, 93 S.Ct. at 1825. Yet, one must not lose sight of the nature of the claim; the plaintiff must prove that the defendant had an actual discriminatory intent, and this intent may not be inferred from evidence which demonstrates something less than an actual intent. *Green v. USX Corp.*, 896 F.2d 801, 806 (3rd Cir. 1990). In addition, statistics are only part of the factual picture painted by the plaintiff. "The probative worth of statistical testimony must be evaluated in light of the methodology employed, the data available, and the factual mosaic unique to the case at hand." *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 156 (1st Cir. 1990). This factual determination will not be disturbed unless it is clearly erroneous. *Green*, 896 F.2d at 806; *Cumpiano*, 902 F.2d at 156.

Although the Fourth Circuit has not commented extensively on the use of statistics in disparate treatment cases, it has indicated that they are entitled to some probative value. In *Warren v. Halstead Industries. Inc.*, 802 F 2d 746 (4th Cir. 1986), the court held:

> Although statistics cannot alone prove the existence of a pattern or practice of discrimination or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures, "[s]tatistical analysis served and will continue to serve an important role" in cases in which the existence of discrimination is disputed.

Id. at 753, *quoting International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856 (1977).

In *United States v. Gregory*, 871 F.2d 1239 (4th Cir. 1989), the-government sued a sheriff for refusing to hire *any* female deputies. As part of its *prima facie* case, the government introduced the statistic that no woman has ever been hired despite the fact that 19 opportunities had existed to do so. The defendant had only responded with "fallacious criticisms of the statistical evidence." *Id.* at 1245. The district court had labelled the statistic "meaningless" because "it did not include applicant flow data and because the Sheriff carried over incumbent deputies, which greatly reduced the Sheriff's opportunity to hire new deputies." *Id.* at 1243. Yet, the Fourth Circuit held that this statistic was probative enough to constitute evidence, because the force of the statistic was "the inexorable zero." *Id.* at 1245, *quoting Teamsters*, 431 U.S. at 342 n.23, 97 S.Ct. at 1858 n.23.

Shortly after *Gregory*, the U.S. Supreme Court handed down *Wards Cove Packing Co., Inc. v. Atonio*, __U.S. __ , 109 S.Ct. 2115 (1989). Admittedly, *Wards Cove* addressed the use of statistics in disparate impact cases, and, thus, it may have only a limited application to disparate treatment cases. Yet, one apposite rule can be lifted from the case: in order to constitute competent evidence, statistics must compare the percentage of minorities in the at-issue job to the percentage of qualified minorities in the relevant labor market. 109 S.Ct. at 2121.

The court has reservations about whether the statistics in the case at bar draw upon the relevant labor market. The plaintiff compared the percentage of black GS-12 appeals analysts to the percentage of black GS-13 analysts. There was no showing of the percentage of black and white GS-12 appeals analysts that are qualified for promotion to GS-13. If the percentages of qualified black and white GS-12 appeals analysts are not equal, then the disparity at the GS-13 level might be meaningless. If, for example, the qualified labor pool had been limited to blacks and whites that had made at least one BQ List, then the

comparison would be much more probative. Without such a showing, the court is being asked to assume that the GS-12 analysts constitute a qualified labor pool. While the court will not disregard the plaintiff's statistics, this defect reduces the value of these statistics.

According to Spoone's analysis, in 1984 (the promotion year), 20.8% (or 35 of 168) of the GS-12 appeals analysts were black, and 15.1% (or 28 of 186) of the GS-13 appeals analysts were black. (Plaintiff's exhibit 38). The plaintiff draws an inference of discrimination from this lack of proportionality. This lack of proportionality is demonstrated from different angles in plaintiff's exhibits 37 through 40 (the last of which was not admitted into evidence).

Yet, an examination of the racial composition of the 1984 BQ List individuals and the selectees magnifies the doubts regarding whether Spoone has isolated the most relevant labor market. On this list of 53 people, 5 were black and 2 were hispanic. Of the 19 that were chosen for promotion from this list, two were black and one was hispanic. Thus, 13.21% of the BQ List individuals were minorities, and 15.79% of the selectees were minorities. 9.43% of the BQ List individuals were black, and 10.53% of the selectees were black.[3] If hispanics are excluded entirely from this small sample, the trend is the same. Of the 51 blacks and whites on the BQ List, 5 are black, or 9.80%. Of the 18 blacks and whites that were selected, two are black, or 11.11% (Calculations based on plaintiff's exhibit 31).

Admittedly, these percentages may not be statistically significant because the 1984 BQ List is a small sample. Nonetheless, the 1984 BQ List is a better qualified labor pool than the GS-12 ranks. In addition, the court reiterates that this is not a disparate impact case. The issue is

---

[3] One of the hispanics was selected for promotion in the next round of promotions.

whether there was an actual intent to deny Gibson a promotion because of her race. In 1984 blacks (and all minorities) on the 1984 BQ List were promoted in roughly the same proportion as their representation on the List. If Semans, Bernardi and/or Papovich had an intent to deny blacks progress in the 1984 round of promotions, it was not reflected in the final numbers.

It is uncertain whether the second tenet of *Wards Cove* applies to the case at bar—that "the plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." 109 S.Ct. at 2124. Nonetheless, Gibson has introduced statistics in order to attack the subjective system used in selecting GS-13 appeals analysts. Since this second tenet of *Wards Cove* has been satisfied, the court will not evaluate its applicability to a disparate treatment case.

C. The Defendant's Subjective Evaluation Process

Once a candidate made the BQ List, the evaluation process was purely subjective. Admittedly, it is impossible to look into the witnesses' minds, so the court is left with the crude task of ascertaining the motivation of individuals through circumstantial evidence. However, this difficulty does not allow the court to presume malevolence. This question of fact is not to be treated differently than any other question of fact; the plaintiff has the burden of establishing an actual intent to discriminate as an element of her case. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478, 1482 (1983).

Yet, in a case such as this one, an attention to detail and a full assessment of the credibility of the witnesses is crucial. When the at-issue process is subjective, "the legitimacy and nondiscriminatory basis of the articulated reason for the decision may be subject to particularly close scrutiny by the trial judge." *Page v. Bolger*, 645 F.2d 227,

230 (4th Cir.), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388 (1981). As inferred above and discussed below, the court finds that the defendant's reasons for not promoting Gibson have withstood the combination of a hard look and plaintiff's evidence of pretext.

D. Overall Evaluation

The court finds that Gibson has not proven that she was denied a promotion because of her race. In order to succeed, Gibson had to prove that there was an actual intent to discriminate buried somewhere in the triad of Semans, Bernardi and Papovich, and that this intent was the reason why Gibson was not promoted. Yet, these individuals all stated legitimate, nondiscriminatory reasons for why Gibson was not promoted, and the court finds that their testimony was truthful.

This finding of credibility is based upon an assessment of their demeanor, and it is supported by other evidence. Each of these three individuals pointed to previous events in their lives that were inconsistent with racism. Papovich had nominated Gibson for a sustained superior performance award due to her productivity, and she won this award. Bernardi won an "Equal Opportunity Award, n and he has nominated several blacks for promotion. Semans has also recommended several blacks for promotion. Indeed, in the promotion at issue, two of the nineteen people selected were black.

The limited objective record reinforces the stated reasons for not promoting Gibson. The most important factor in the promotion decision was the quality of the applicant's work. On each of Gibson's evaluations which was entered into evidence, she was awarded a "3" for the quality of her work. Gibson never earned a "4" ("outstanding"), which is the highest rating. Yet, of the 19 people selected for this promotion, 14 people were rated a "4" for quality of the relevant assessment, and the other 5 people were rated a "3". (Compiled from plaintiff's exhibit 13).

Despite the paramount importance of quality, Gibson relied extensively on a comparison of her overall evaluation to those selected. Of the 19 people selected, 12 people were rated "outstanding", 6 people were rated "excellent" and 1 person was rated "fully satisfactory." Gibson was rated "excellent" in this performance appraisal. (Defendant's exhibit 9).

In sum, Gibson has not produced any strong evidence of discrimination; she has relied on her qualifications and Spoone's statistics. In regard to qualifications, at best Gibson has demonstrated that she might be a competent GS-13. She has not shown that she was more qualified than those selected; indeed, the average person selected had a higher quality score and overall rating. The defendant is not required to promote a minority when that person's qualifications roughly equal those of a non-minority. Instead,

> the employer has the discretion to choose among equally qualified candidates, provided the decision is not based on unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination.

Burdine, 101 S.Ct. at 1097.

The plaintiff's statistical evidence does not undercut this assessment. As noted above, this evidence is not entitled to significant weight because (1) this is a disparate treatment case, (2) the statistics do not utilize BQ List candidates as the relevant labor market, and (3) the composition of selectees from the 1984 BQ List was not disproportionately white. Any remaining probative force in Spoone's statistics is overwhelmed by the defendant's evidence.

This analysis is not meant to belittle Gibson. The court is satisfied she was a high producer, and that she was competent for the position of GS-13. Unfortunately, she has faced stiff competition, and her seniority and competence alone did not entitle her to a promotion.

IV. CONCLUSION

The defendant articulated a legitimate, non-discriminatory reason for not promoting Gibson to GS-13: the other candidates for promotion were more qualified. The plaintiff failed to prove that this reason was a mere pretext and that actual discrimination took place. Accordingly, judgment is entered for the defendant-, and an appropriate order shall be issued.

Dated: February 20, 1991
Alexandria, Virginia

/s/ James C. Cacheris
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

91-1527
CA-90-936-A

Gibson v. Sullivan, Sec

INFORMAL BRIEF

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds? Yes.

   Please see attached.

2. Did the district court incorrectly decide the facts? If so, what facts? Yes.

   Please see attached.

3. Do you think the district court applied the wrong law? If so, what law do you want applied? No, but appellant feels the district court failed to apply the following portions of the law:

   A. *Lanphear v. Prokop*, 703 F.2d 1311 (1983)—"In an employment discrimination suit in which employee has established prima facie case of discrimination, employer cannot meet its burden of articulating a legitimate reason for its action merely through an answer to the complaint or by argument of counsel but must clearly set forth, through introduction of

admissible evidence, the reasons for employee's rejection and the explanation provided must be legally sufficient to justify a judgment for employer. Civil Rights Act of 1964, §§ 701-718, 42 U.S.C.A. §§ 2000e to 2000e-17."

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what? No, Appellant has included all reasons she is aware of.

5. What action do you want the Court to take in this case?

   Please see attached.

6. If you think the Court should hear oral argument in this case, why do you think so? N/A

/s/ Thelma Gibson
Signature
NOTARY NOT REQUIRED

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

Richard Parker, Esq.
OFFICE OF THE U.S. ATTORNEY
1101 King Street, Suite 502
Alexandria, Virginia 22314 Copy mailed: July 23, 1991

Robert J. Kelley, Jr. Esq.
OFFICE OF THE U.S. ATTORNEY
1101 King Street, Suite 502
Alexandria, Virginia 22314 Copy mailed: July 23, 1991

1. A. The district court's finding that the appellee articulated a legitimate, non-discriminatory reason for not promoting appellant to GS-13 Hearings and

Appeals Analyst/Paralegal Specialist position is clearly erroneous for the following reasons:

(1) Appellee's contention that appellant was not promoted because she had a "3" excellent rating for quality and not a "4" outstanding, is clearly discriminatory when white candidates with "3" excellent ratings were promoted. On the 10/01/82-09/30/83 appraisals used by Personnel, appellant's appraisal was identical to Brent Hillman, a white candidate, and her quality rating was the same as Darrell Axelson, Louis Collins, Virginia Gallo, Douglas Halleen, Olga Kelley, and Kenneth Morphy, all white candidates promoted (Plaintiff's Exhibit 13, Defendant's Exhibit 12.a).

(2) Appellee's contention that appellant was not promoted because an Appeals Council Member, Joseph Doneghy, characterized her work as "very average" is clearly erroneous. Mr. Doneghy's comments have been consistent. He advised Investigator John Dowe and testified that he made no such remark about appellant. (Investigation Report Exhibit 21, EEO hearing transcript page 78). No such comment is even documented in the record. It originated with Bernardi, who has contradicted himself in testimony, and ended with his destruction of the written evidence upon which he alleges his recommendation was based. Such destruction was in clear violation of SSA Personnel Guides for Supervisors, Chapter IX, SSA Guide 1-4, TS No. g378,—"Each agency *must* (emphasis added) maintain a temporary record of each promotion sufficient to allow reconstruction of the promotion action, including *documentation on how candidates were rated and ranked* (emphasis added)"

(3) Appellee contends appellant was not promoted because she had problems with syntax, awkward phrasing and grammar, and concerns about her reviewing the work of lower grade appeals analysts, a supervisory requirement at the GA-13 level. Of these problems existed and were of such concern as to prevent her advancement, then there are regulations that provide for certain steps to be taken. AFGE National Agreement Article 21, Section 7-A. provides: "*Informal discussions, including review of performance to determine progress and problems* (emphasis added), are *a normal* (emphasis added) part of supervision and should occur throughout the appraisal period." Section 7-B. provides the following:

"1. Progress reviews may be conducted whenever needed. . . .

3. Documented progress reviews will summarize the employee's progress in comparison to the performance expectations, any problems encountered or anticipated, any corrective actions taken or planned and any changes in the performance expectations warranted by changes in the work situation including those beyond the control of the individual.

4. The supervisor will provide a copy of the documented progress review to the employee."

In addition, Section 7-C. directs that:

"Should performance indicate potential unsatisfactory performance . . . appropriate action will be taken as follows. *The supervisor shall develop and discuss with the employee a written performance improvement plan* (emphasis added) identifying the employee's performance

deficiencies, the action that must be taken by the employee to improve the performance, and any provisions for counseling, training, reassignment, or other assistance as appropriate."

Appellant was unaware that her appraisals did not qualify as to why she had not been promoted. Her immediate supervisor, Bill Papovich, has always told her that he didn't know why she had not been promoted (hearing transcript page 177). Papovich told her he had recommended her, that he was not involved in the selection process and he had never asked Semans how he made selections. Papovich advised her that Joseph Bernardi, her second line supervisor, "sometimes" would ask him who he recommended and he would give his recommendation, but that he had nothing to do with who was promoted as his input was informal.

Appellant is black not stupid, and the two are not synonymous. Common sense dictates that had she been given the reasons expressed by Papovich or any other reason(s), she would not have continuously asked why she had not been promoted, but would have addressed any reason(s) given. Appellant even wrote Semans and Personnel on July 6, 1987 inquiring as to why she had not been promoted. While Semans did not respond, Ms. Bonnie L. Miller, Chief of Recruitment and Placement Branch, responded on July 21, 1987. She advised that selections "are made by the designated selecting official and not the personnel office. Accordingly, we are unable to provide an explanation of why you have not been selected for promotion to the GS-13 level. In addition, since your name is consistently being referred on best qualified lists, your application

would appear to require no improvement at this time."

Bill Papovich's testimony that he would not be comfortable with appellant reviewing the work of lower grade employees in pretextual, as appellant has supervisory experience and SSA supervisory training, while neither Douglas Halleen, who was promoted from Papovich's branch on the 84-133 announcement, nor Marianne Julian, promoted from Papovich's branch on the 85-156 announcement, had supervisory experience. Furthermore, nine of the 19 white candidates promoted did not have supervisory experience. They are shown in Plaintiff's Exhibit 13-B,D,H,J,K,L,M,O, and R, as Karen R. Axelson, Mary B. France, Geraldine M. Grant, (Douglas A. Halleen, already mentioned), Brent B. Hillman, Carol A. Hyland, Olga Kelley, Kenneth N. Morphy, and Carl L. Warren.

Bernardi and Semans testified that they had agreed to promote appellant (Bernardi testified that he had not discussed this with Papovich 0Defendant's Exhibit 5, pages 78 and 79), however, at the district court hearing he contradicted himself and testified that he did discuss this with Papovich) the next time there were vacancies (85-156 announcement). However, according to Bernardi, he phoned the personnel office and was advised she did not apply. The district court erred by failing to consider the fact that appellant did apply, was not on the BQ list, and the reason she was not on said list. Appellant/Plaintiff's counsel pointed out at the hearing that an error was made on her manpower sheet for December 1984. December had 160 work hours, not 168, as one day was a Christmas holiday. Thus, her total hours in casework should

have been 197.60 rather than 183.51 (Plaintiff's Exhibit 21). This correction would have restored her "4" rating in production and placed her on the BQ list with a 97. While appellant realizes this could have been an honest oversight, she contends that it was intentional since Investigator McDougal was negotiating a settlement, and since she was again on the BQ list after the 85-156 vacancy announcement but was not promoted. Appellant feels racial discrimination is further evident by the fact that even without the correction, her productivity scale was 137.56% and she received a "3" in production, while white candidates promoted had a productivity scales of 124.3% and 136.6%, and they received a "4" in production (Plaintiff's Exhibit 13-F and 13-I).

Semans testified over and over again that he was not interested in the 82-83 appraisal, but in the latest appraisal, 83-84. Appellant suspects that appellee decided who would be promoted and then the "4" appraisal ratings were used to support the promotion after the fact. While it stands to reason that some candidates would have maximum ratings, appellant contends that it is highly suspect that so many white candidate promoted just happened to have "4" ratings in all GJTs for a total score of 52, and black employees doing the same work were not so highly rated. Appellant offers the following examples based on the evidence of record:

(1) Marianne Julian, a white candidate on the 85-156 BQ list who was promoted from Papovich's branch, was a GS-9 in October 1981 when he became her supervisor. He promoted her to GS-11 on March 7, 1982, and to GS-12 on March 20, 1983. During this period of time, she alleges

no supervisory experience. Yet Papovich, "in his mind" was more comfortable with her as a GS-13 supervisor than he was with the black appellant who had supervised and had supervisory training. In her 03/20/83-09/30/83 appraisal, Ms. Julian was rated "fully satisfactory." In her next appraisal, 10/01/83-09/30/84, she had the same "fully satisfactory" rating and was not on the 84-133 BQ list 0although Papovich testified that he rated appellant who was on this BQ list, lower than Ms. Julian) (Plaintiff's Exhibit 6, page 3, 7th from the bottom of the page). Nevertheless, on her appraisal for the period 10/01/84-09/30/85, 0when appellant's appraisal was lowered by error, preventing her from being on the 85-156 BQ list; and when she was not rated a "4" for production although her productivity scale was higher than some of the white candidates promoted) Ms. Julian was rated "4's" in ALL GJTs for maximum points of 52 and was promoted (Plaintiff's Exhibit 20, first column, second from the bottom).

(2) Of the 21 candidates promoted on the 85-156 BQ list, 19 had appraisal scores of 50-52, 16 of whom were not on the 84-133 BQ list (Plaintiff's Exhibit 16).

(3) It seems logical that if persons have never been on BQ lists when the cut-off was lower (84-133 cut-off was 90, and 85-156 cut-off was 95), it would be almost impossible for them to be on BQ lists when the cut-off is higher. Yet, on a recent OHA 9073 vacancy announcement, the cut-off was 99, and five white candidates (ira Brooks, William LaLonde, Jack Leary, Ruth Simmons, and Anne Wilhelmsen) who were not on either of the above BQ lists were on the 90-

73 list by receiving scores of 52 on their appraisals.

2. A. The district court held that—"No one disputed that Gibson would have risen to the GS-13 level if it had not become a competitive position." However, qualification standards for carrier ladder promotions and competitive promotions are the same under the regulations (Plaintiff's Exhibit 24, pages 7 and 38). The district court incorrectly accepted appellee's contention that there is a difference in qualification requirements.

B. The district court held that Semans, Bernardi and Papovich were not provided the best qualified (BQ) list scores and these scores were not considered in the subjective evaluation process. However, the evidence establishes that they *were not provided these scores by the personnel office*, but *they were reconstructed through Semans' illegal procedure* (Investigation Report, Exhibit 1, page 11 of 19—sample of the type of information Semans' requested). Otherwise, what scores were Bernardi referring to when he testified that plaintiff ranked lowest of the 19 candidates on the BQ list from Division II; and what quality score was Semans referring to when he testified that plaintiff was not promoted because she did not have a score of "4" in quality? Semans intentionally sought this information and, knowing it was illegal, had it destroyed, in violation of applicable regulations (Defendant's Exhibit 12.a, page 000438).

C. The district court held that of the 17 white people selected, two had BQ list scores lower than appellant. In reaching this conclusion, the court relied on a memorandum submitted by Ms. Rocheford, a Personnel Specialist, in support of her contention that the 1982-1983 appraisals had to be used for the 84-

133 announcement and not the current 1983-1984 appraisals, thus refuting the Associate Commissioner's memorandum dated May 14, 1987, wherein she states that the current appraisal gave appellant a score of 97, which placed her above seven of the white selected for promotion rather than above two.

The appellant contends that there are two errors here. First of all, with all due respect to Ms. Rocheford, the record contains no authorization from the Associate Commissioner's office giving a lower grade employee the authority to speak for or change any decision reached by an Associate Commissioner. Secondly, this memorandum (Defendant's Exhibit 8), as appellant interprets it, states that the completed appraisals (10/01/83-09/30/84). were to be *released to employees during the week of October 22, 1984*. This could not be referring to the 10/01/82-09/30/83 appraisals because employees already had them and had had them since 10/83. This memorandum also stipulates that these current appraisals *will be used in the competitive process for vacancies posted on or after November 12, 1984*. Therefore, since the 84-133 vacancy announcement was posted on 10/31/84 (Plaintiff's Exhibit 4), the 83-84 appraisal was applicable. In other words, the 83-84 appraisals were to be used for vacancies posted on or after November 12, 1984. This memorandum, appellant contends, is consistent with the vacancy announcement and the SSA National Promotion regulations, which provided for the use of current appraisals.

D. The district court held that—"Applicants who made the BQ List were required to submit a personal qualification statement, . . ." This statement is in error, as applicants had to submit their qualifications and any other material *before* names were certified on the BQ list. The Personnel Manual provides that—"If a vacancy announcement requires applicants to

submit a copy of their appraisal and an employee fails to do so, the employee *must* (emphasis added) not receive credit for the 'appraisal factor' (Plaintiff's Exhibit 24, page 17.)" Semans' selection procedure violated this regulation, as well as others (same exhibit, pages 10 and 16). He did not list his selection procedure of the vacancy announcement, and he sought no prior written approval as directed by regulations, prior to its implementation. Semans' direction to the division directors to obtain and consider material that was not a part of the promotional package prior to names being certified on the BQ list, also violated this regulation.

E. The district held that—"Despite the paramount importance of quality, Gibson relied extensively on a comparison of her overall evaluation to those selected." the district court erred in not finding that appellee should have done the same, and not randomly selected a GJT score to justify their action. The Personnel Manual provides that—"In applying qualification standards, *all of a candidate's experience must be considered* . . . (emphasis added)" (Plaintiff's Exhibit 24, page 32).

2. Did the district court incorrectly decide the facts? If so, what facts?

F. Finally, a look at the highly qualified candidates with higher quality scores and overall ratings than appellant.

On her 10/01/82-09/30/83 appraisal, appellant's progress review comments were:

"Discussed performance with employee and advised her that he (sic) was performing at least at an above average to outstanding level, except for GJT 22." (Defendant's Exhibit 12.a, page 000397; Plaintiff's Exhibit 1-B. (1)).

On her 10/01/83-09/30/84 appraisal, appellant's progress review comments were:

"Ms. Gibson continued to perform at a high level of excellence to outstanding in the various job categories." (Defendant's Exhibit 12.a, page 000395; Plaintiff's Exhibit 1-B. (2)).

Plaintiff's Exhibit 13-F.; and Defendant's Exhibit 12.a, page 000240:

"Mr. Gilliam('s) . . . productivity scale has been 131.2% (level 4) (Appellant's productivity scale was 137.56 before correction, but yet received only a "3", see this brief section, page 5, 4th paragraph.) . . . Mr. Gillian's quality and production continue to be excellent. . . . his productivity scale averaged 124.3%."

Plaintiff's Exhibit 13-I; and Defendant's Exhibit 12.a, page 000263:

"His productivity scale . . . was 136.6% (level 4). . . . Mr. Grissett substantially exceeded all critical job elements and virtually all non-critical job elements."

Appellant contents that this evidence shows that there was no significant difference in her performance and the white candidates', yet they were rated "4" for quality while she was rated "3". Furthermore, as previously noted, her productivity scale even without correction was higher than theirs, yet they received a "4" for production and she received a "3" and was eliminated from the 85-156 BQ list.

2. Did the district court incorrectly decide the facts? If so, what facts?

G. The district court erred in finding that Papovich's testimony lacked racial animus because he had recommended appellant for an award in August 1984,

which she received. The court held that this "sustained superior performance" award was geared more toward high productivity than quality of product. Nevertheless, both Halleen and Julian received the same award but were considered "superior" to appellant.

Appellant wishes to point out here that both appellee and the district court imply that "performance" relates only to productivity. However, Personnel regulations define *Performance* has "expressed measures of the level of achievement of each element for the duties and responsibilities of a position or group of positions. Performance standards may include, but are not limited to, measures such as quantity, quality, timeliness and cost efficiency."

Appellant's personnel records will reveal that she is the recipient of two high quality awards, a Special Achievement Award, and a Group Award, prior to her employment in the Office of Appeals Operation. Since being a part of this Office, she volunteered to assist with the Combined Federal Campaign for 1978-1979, and was chosen to be the Keyperson for the entire Glebe Road Building. She was subsequent awarded the 1978-1979 Combined Federal Campaign Award. Plaintiff's appraisals over the years show that she demands of herself a high quality and quantity in her performance. This is quite evident by the fact that after receiving the August 1984 award she received a Suggestion Award, and Superior Performance Awards.

A report of record, "Affirmative Employment Program For Minorities And Women" (Plaintiff's Exhibit 28, page 58), indicates a Nationwide low selection rate for female EEO groups in grades GS-13 and above; and a disproportionate percentage of minorities, particularly black men applicants, failed

to make the best qualified lists, as compared to whites. Appellant contends that this evidence is a good example of how supervisors rate white employees higher than black employees. Even when a black employee has appraisal scores the same or higher than white employees, they still are passed over for promotion. None of the white candidates promoted in any of the three announcements cited herein have been on four + BQ lists continuously without being promoted. The "Career Ladder" concept was not closed to them, as they have been promoted as soon as they have a year in as a GS-12.

3. Do you think the district court applied the wrong law? Is so, what law do you want applied?

B. *Schlei & Grossman*, Employment Discrimination Law 479-84 (2d ed. Supp. 1989). ". . . whether their are material issues of fact in dispute concerning whether defendant's asserted non-discriminatory reason, the comparison of plaintiff's skills to those of the other candidates, is pretextual." (Order dated 12/2/90 by U.S. District Judge T. S. Ellis, III).

C. *White v. Federal Express Corp.*, 729 F. Supp. 1536, 1555 (E.D. Va. 1990); *Warren v. Halstead Industries*, 802 F.2d 746, 753 (4th Cir. 1986) "('numerous inconsistencies and conflicting documentary evidence (may) render the (defendant's) story unreliable'), *rev'd in part, aff'd in pertinent part*, 835 F.2d 535 (4th Cir.) (*en banc*) (*per curiam*), *cert. denied*, 487 U.S. 1218 (1988)." (Same Order as 3. B. above).

D. *Love v. Alamance County Board of Education*, 757 F.2d 1504 (4th Cir. 1985). "The Fourth Circuit has also concluded that the legitimacy of an employer's articulated reason for decision is subject to particularly close scrutiny when the decision is based on

subjective criteria or standards." (Same Order as 3. B. above).

E. *Krodel v. Young*, 748 F.2d 701 (1984). In Krodel, the evidence of pre-selection was very persuasive. Also, the selecting official could not give any convincing reasons why a woman was rated highly qualified when, in fact, she had only a few months experience and no supervisory experience. (In appellant's case, neither Halleen nor Julian had supervisory experience.)

F. *Washington v. Davis*, 96 S.CT 2040, 426 U.S. 229, 48 L.Ed.2d, 597. It was found that where tests were used to rank applicants according to their scores, where only those with the highest scores were certified for job placement, and where there was no evidence showing that those with higher test scores did better on the job than those with lower test scores, the use of test scores for ranking purposes, rather than as a device to screen out candidates without minimum skills, was impermissible under Title VII.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

G. *Ortiz v. Secretary of the Department of Health and Human Services*, EEOC Appeal No. 02880021. "The Arbitrator found that reliance on the opinions of Appeal Council members was a post hoc justification for not promoting appellant, which was outside of the National Agreement and the law." (While, at the last hour, Bernardi and Semans tried to downplay Appeals Council Member Doneghy's alleged comments, the mere fact that they both stated these alleged comments as part-basis for not recommending/promoting appellant indicates their reliance on such evidence. If they did not consider these alleged comments, why include them as a reason at all?)

H. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (1984). "The defendant used no formal procedures . . . for determining who would be offered the promotion. Instead, the company relied on 'word of mouth' and informal review procedures. We have recognized that such subjective procedures can lead to racial discrimination, both because important information may be available only to whites and because such procedures place no check on individual biases. . . . For this reason we have held that '(t)he failure to establish 'fixed or reasonably objective standards and procedures for hiring' is a discriminatory practice". (In appellant's case, the only black division director was unaware of Semans' procedure (EEOC hearing transcript pages 26-30). While he alleges no racial animus because of GS-14 and GS-15 blacks promoted to "*serve under him*", his exclusion of the black division director from his selection procedure is an indication as to just how they served under him.)

5. What action do you want the Court to take in this case?

A. To find appellee in violation of Title VII, and appellant the victim of race discrimination and entitled to back pay and retroactive promotion. (*Albermarle Paper Co. v. Moody*, 422 U.S. 405, 422 (1975).)

B. To award appellant the costs of this action and her attorney fees incurred in pursuing this case. (42 U.S.C. § 2000e-5(k).)

C. To award all other and further relief as the Court may consider just and proper under applicable law(s).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1527
CA-90-936-A

Gibson v. Sullivan, Sec

FILED
September 15, 1992

M A N D A T E

The judgment of this Court dated 8/11/92 takes effect today.

BERT M. MONTAGUE
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1527

THELMA L. GIBSON,
Plaintiff-Appellant,

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Chief District Judge. (CA-90-936-A)

Submitted: May 15, 1992

Decided: August 11, 1992

Before HALL and NIEMEYER, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Thelma L. Gibson, Appellant Pro Se. Richard Parker, Robert James Kelley, Jr., OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Thelma L. Gibson appeals from the district court's order denying her relief at trial on her Title VII complaint. Our review of the entire record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *Gibson v. Sullivan*, No. CA-90-936-A (E.D. Va. Feb. 20, 1991). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

91-1527
CA-90-936-A

Gibson v. Sullivan, Sec.

PETITION FOR REHEARING
SUGGESTION FOR REHEARING IN BANC

PURPOSE—A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
3. The opinion is in conflict with another decision of the Court or of another court of appeals and the conflict is not addressed in the opinion.

In pro se appellant's judgment, one or more of the situations exist as described in the above "Purpose" section.

1. **A material fact or law overlooked in the decision.**

MATERIAL FACTS: (a.) White candidates rated/ranked "excellent" on their appraisals were promoted to GS-13 Hearings and Appeals Analyst positions, but appellant who is Black and was also rated/ranked "excellent" on her appraisal was passed over for promotion to a GS-13 Hear-

ings and Appeals Analyst position—**DISPARATE TREATMENT.**

(b.) White candidates rated/ranked "3" in GJT 104 (quality) on their appraisals were promoted to GS-13, but appellant who is Black and was also rated/ranked "3" in GJT (quality) was passed over for promotion to GS-13—**DISPARATE TREATMENT.**

(c.) A white candidate with the same identical GJT ratings/rankings on his appraisal as this Black appellant was promoted to GS-13, but the Black appellant was passed over for promotion to GS-13—**DISPARATE TREATMENT.**

(d.) Neither William Papovich, Joseph Bernardi, nor Edwin Semans, Jr. articulated a legitimate, non-discriminatory reason why an "excellent" rating/ranking and a "3" GJT 104 (quality) rating/ranking justified promotions to GS-13 positions for white candidates, but the same ratings/rankings did not justify a promotion for this Black appellant—**DISPARATE TREATMENT.**

(e.) Under William Papovich, no Blacks from Branch 17 were ever promoted to GS-13 Hearings and Appeals Analyst positions, but white employees were readily promoted—**DISPARATE TREATMENT.**

(f.) Under Joseph Bernardi, no Blacks from Division III were ever promoted to GS-13 Hearings and Appeals Analyst positions, but white employees were readily promoted—**DISPARATE TREATMENT.**

(g.) Under Edwin Semans, Jr., no Blacks from Branch 17 or Division III were ever promoted to GS-13 Hearings and Appeals Analyst positions, but white employees were readily promoted—**DISPARATE TREATMENT.**

(h.) When this Black appellant's appraisal score was corrected from 92 to 97, she rated/ranked higher than eight (8) white candidates promoted (Defendant's Exhibit 10, pages 13 and 14, 000023 promotion—**DISPARATE TREATMENT.**

LAW: (i.) The District Court decision points out that there was no dispute that this Black appellant would have risen to the GS-13 level had the position not become competitive (page 5); however, under the law, qualifications were the same for career ladder and competitive positions. Therefore, had it not been for the fact the appellant is Black, she too would have been promoted under the competitive system as white candidates were.

(j.) The District Court held that the defendant articulated a legitimate, non-discriminatory reason for not promoting appellant to GS-13, that reason being, that the other candidates for promotion were more qualified. However, the law, unlike the defendant, is "colorblind" when it comes to defining "excellent" and the "3" rating. Both white and Black candidates received the same appraisal sheets with the same definitions for "excellent" and the "3" rating. Therefore, white candidates promoted to GS-13 positions with "excellent" and GJT 104 "3" ratings cannot, under the law, be considered "more qualified" than this Black candidate with these same ratings.

(k.) The defendant gave no reason at all why the 19 candidates were promoted over appellant, as the defendant never compared her with the white male candidate who was promoted from her branch, or any of the other 18 candidates promoted. The District Court did not follow the letter of the law in finding that the defendant did make this comparison; and the defendant did not following the law of the competitive selection procedure.

(l.) The law requires that a temporary record, not contradictory subjective recollections, of each promotion be kept so that the promotion action can be reconstructed (SSA Personnel Guides for Supervisors, Chapter IX, SSA Guide 1-4, TS No. g378). the defendant violated this law by **destroying the evidence** used for these promotions.

(m.) The fact that the defendant relied on contradictory subjective recollections in an attempt to justify a racial

reason(s) for passing over this Black applicant for promotion, demonstrates that the particular promotional selection practice used by the defendant served to create **DISPARATE TREATMENT** in violation of the U.S. Supreme Court decision in *Wards Cove Packing Co., Inc. v. Antonio*, U.S., 109 S.Ct. 2124 (1989); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1981), as amended in 1991; and applicable laws.

(n.) This particular promotional selection practice violated the law and allowed the defendant to compare this Black appellant with a white employee from her branch who was not even on the best qualified list; compare her with a white applicant from her branch who was on the best qualified list but was not promoted at that time but later on another announcement; reframe from comparing her with the white male from her branch who was promoted; reframe from comparing her with the 52 candidates on the best qualified list; and reframe from comparing her with the 19 candidates selected for promotion to GS-13.

(o.) This particular promotional selection practice violated the law by requiring that in order for this Black candidate to be promoted to GS-13, she had to rank one point higher than the white candidate promoted even though they both had tied ratings. Such action serves to promote the premise that Blacks have to be twice as qualified as whites applying for the same position. Such action also serves to show that different standards are used for Blacks than for whites. If a white candidate with the same identical "excellent" rating as this Black candidate is promoted, how does the "excellent" rating differ for this Black candidate?

(p.) This particular promotional selection practice that the defendant testified had been used since it was instituted in November 1977 (District Court decision, page 5), violated the law and allowed the defendant to destroy the

main evidence used to make the final decision justifying the specific reason(s) for the promotional selections.

(q.) Past practices of this particular promotional selection process was the result of intentional discrimination against this Black appellant as well as other Black GS-12 employees in Division III, and served to create "a glass ceiling" through which this Black applicant and others could not penetrate. Objective evidence of record shows, and the defendant does not dispute, that this Black appellant was on the best qualified list for GS-13 Hearings and Appeals Analyst position announcements:

(1.) OHA-80-96, July 7, 1980, but was passed over for promotion by the defendant in favor of white candidates;

(2.) OHA-82-136, August 25, 1982, but was passed over for promotion by the defendant in favor of white candidates;

(3.) OHA-83-100, July 13, 1983, but was passed over for promotion by the defendant in favor of white candidates;

(4.) OHA-84-133, October 31, 1984, but was passed over for promotion by defendant in favor of white candidates; and

(5.) OHA-86-180, June 11, 1987, but was passed over for promotion by defendant in favor of white candidates.

2. **A change in the law which occurred after the case was submitted and which was overlooked by the panel.**

(a.) Applicable provisions of the 1991 Civil Rights Act. The panel affirmed, without any modifications, the District Court decision which was issued prior to the change in the law. The 1991 Civil Rights Act allows federal employees to choose to have discrimination cases heard by juries; allows up to $300,000 in compensatory dam-

ages; and allows interest on back pay, attorney's fees, and payment of expert witness fees, etc.

3. **The opinion is in conflict with another decision of the Court or of another court of appeals and the conflict is not addressed in the opinion.**

(a.) The opinion is in conflict with the 1991 Civil Rights Act;

(b.) *Lanphear v. Prokop*, 703 F.2d 1311 (1983); and

(c.) *William F. Roberts v. Anthony Frank*, Postmaster General, U.S. Postal Service, District of Columbia, 91-0849.

Respectfully submitted,

/s/ Thelma L. Gibson
Thelma L. Gibson, Pro se
585 Eskimo Hill Road
Stafford, Virginia 22554

(703) 659-3774 - Home
(703) 305-0397 - Office

Date: August 21, 1992

cc:

Robert J. Kelley, Jr., Esq.
OFFICE OF THE U.S. ATTORNEY
1101 King Street, Suite 502
Alexandria, Virginia 22314

Richard Parker, Esq.
OFFICE OF THE U.S. ATTORNEY
1101 King Street, Suite 502
Alexandria, Virginia 22314

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-1527

THELMA L. GIBSON

Plaintiff-Appellant

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

Defendant-Appellee

FILED
September 8, 1992

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219

BERT M. MONTAGUE
CLERK

TELEPHONE
(804) 771-2213

September 8, 1992

Robert James Kelley Jr., Esq.
OFFICE OF THE U. S. ATTORNEY
1101 King Street
Suite 502
Alexandria, VA 22314

Richard Parker, Esq.
OFFICE OF THE U. S. ATTORNEY
1101 King Street
Suite 502
Alexandria, VA 22314

Thelma L. Gibson
585 Eskimo Hill Road
Stafford, VA 22554

Re: 91-1527 Gibson v. Sullivan, Sec

Dear Counsel:

Enclosed is a copy of an order filed 9/8/92, denying appellant's petition for rehearing in this case.

Yours truly,

BERT M. MONTAGUE
Clerk

/s/ Beth Catogni
By:_____
Deputy Clerk

Enclosure(s)

cc: Doris R. Casey